

(21,745.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 84.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER  
WHITTREN, AND ANDREW EADIE, PETITIONERS,

*vs.*

JOSEPH HAMMER, OTTO HALLA, AND B. SCHWARZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print
Caption .....	<i>a</i>	1
Order enlarging time to file record, &c. ....	1	1
Names and addresses of attorneys.....	2	2
Transcript from the district court of Alaska, second division .....	2	2
Complaint.....	3	2
Summons.....	5	3
Marshal's return.....	6	4
Demurrer of Waskey <i>et al.</i> to complaint.....	7	4
Demurrer of Whittren <i>et al.</i> to complaint.....	8	5
Order overruling demurrers, &c.....	9	5
Answer of Whittren <i>et al.</i> .....	10	6
Order granting leave to add J. J. Chambers as a party defend- ant.....	12	7
Answer of F. H. Waskey <i>et al.</i> .....	13	8
Exhibit A—Lease, Eadie & Whittren to Waskey, June 11, 1906 .....	18	10
Exhibit B—Agreement between Eadie, Whittren, and Waskey, June 20, 1906.....	23	13

	Original.	Print
Reply to answer of Waskey <i>et al.</i> .....	28	15
Reply to answer of Whittren <i>et al.</i> .....	31	17
Verdict.....	36	19
Motion for new trial.....	37	20
Order overruling motion for new trial, &c.....	39	21
Judgment.....	40	22
Bill of exceptions.....	43	23
Testimony of B. Schwarz.....	44	24
Exhibit 2—Notice of location.....	46	25
1—Map.....	49	26
X—Map.....	50	26
Testimony of Otto Halla.....	54	28
Testimony of J. Potter Whittren.....	58	30
Exhibit 5—Location Notice No. 13772.....	66	34
D—Map.....	70	35
E—Map.....	71	35
F—Field notes, &c.....	79	39
G—Field notes, &c.....	80	39
Testimony of Charles D. Taft.....	81	40
F. M. Lange.....	85	41
Arthur Gibson.....	85	42
J. J. Chambers.....	86	42
J. Potter Whittren (recalled).....	86	42
Andrew Eadie.....	87	43
Exhibit H—Deed, Whittren to Eadie, Sept. 24, 1905..	88	43
Stipulation admitting that defendant was a lessee.....	91	45
Motion for verdict for plaintiffs.....	91	45
Decision on motion for verdict for plaintiffs.....	93	46
Instructions of court to jury.....	95	47
Exceptions to instructions.....	97	48
Prayer for settlement of bill of exceptions.....	98	48
Judge's certificate to bill of exceptions.....	98	49
Assignment of errors.....	100	49
Petition for writ of error.....	103	51
Bond on writ of error.....	105	52
Writ of error (copy).....	108	54
Clerk's certificate.....	110	55
Writ of error (original).....	112	56
Citation (original).....	114	57
Clerk's certificate to printed record.....	117	58
Caption to proceedings in United States circuit court of appeals....	118	59
Order of submission.....	119	59
Opinion.....	120	60
Judgment.....	133	66
Order denying petition for rehearing.....	134	67
Clerk's certificate.....	135	67
Writ of certiorari.....	136	68
Stipulation as to return to writ of certiorari.....	139	69
Return to writ of certiorari.....	142	70

a

No. 1609.

United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN  
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARTZ, Defendants  
in Error.Upon Writ of Error to the United States District Court for the  
District of Alaska, Second Division.

## TRANSCRIPT OF RECORD.

1     *[Order Enlarging Time to File Record Thereof and to  
Docket Cause.]*

In the United States Circuit Court of Appeals for the Ninth Circuit.

F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and ANDREW  
EADIE, Plaintiffs in Error,

vs.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Defendants  
in Error.

Good cause appearing therefor, it is hereby ordered that the time for the plaintiffs in error to file the Transcript of the Record in the above-entitled cause and docket the same in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged ninety (90) days after the return day of the citation.

Done at Nome, this 1st day of February, 1908, by the undersigned Judge, who signed the Citation on the Writ of Error issued herein.

ALFRED S. MOORE,

*Judge District Court, District of Alaska, Second Division.*

[Endorsed:] C. C. A. No. 1609. In the District Court for the District of Alaska, Second Division. F. H. Waskey, et al., Plaintiff, vs. Jos. Hammer, et al., Defendant. No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Order Enlarging Time to File Transcript of Record. Filed Apr. 6, 1908. F. D. Monckton, Clerk. Re-filed May 19, 1908. F. D. Monckton, Clerk. Ira D. Orton, Attorney for Plaintiffs in Error

## [Names and Addresses of] Attorneys of Record.

T. M. Reed, Nome, Alaska,  
 Elwood Bruner, Nome, Alaska,  
 J. Allison Bruner, Nome, Alaska,

## Attorneys for Plaintiffs.

F. E. Fuller, Nome, Alaska,  
 O. D. Cochran, Nome, Alaska,  
 Ira D. Orton, Nome, Alaska,  
 C. D. Murane, Nome, Alaska,  
 W. A. Gilmore,

## Attorneys for Defendants.

In the U. S. District Court, District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,  
 vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and  
 ANDREW EADIE, Defendants.

3

*Complaint.*

The plaintiffs complain of defendants, and for a cause of action allege:

1. That ever since the 1st day of January, 1904, the plaintiffs have been, and they now are, the owners in fee and entitled to the possession, by virtue of a valid mining location known and described as the Golden Bull Placer Mining Claim, of the following described premises, lying and being in the Cape Nome Mining and Recording District, in the District of Alaska, to wit: Commencing at the northeast corner of the Golden Bull Placer Mining Claim; thence running by magnetic courses S. 27 deg. 15' E. 630 feet; thence S. 45 deg. W. 695 feet; thence N. 27 deg. 30' W. 495 feet; thence N. 35 deg. 10' E. 747 feet to the place of beginning, containing about 8.55 acres.

2. That on the — day of June, 1906, the defendants forcibly and unlawfully ousted and ejected the said plaintiffs from the premises above described, and ever since that time have withheld, and are now withholding, the possession thereof from the plaintiffs, to their damage in the sum of Seventy-Five Thousand Dollars (\$75,000.00).

Wherefore the plaintiffs pray for Judgment as follows: That they be decreed to be the owners in fee, and entitled to the possession of the premises aforesaid; that they do have and recover from the defendants, and each of them, damages in the sum of Seventy-Five Thousand Dollars; and for their costs and disbursements herein.

4

T. M. REED,  
 Attorney for the Plaintiffs.



UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Otto Halla, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

OTTO HALLA.

Subscribed and sworn to before me this 13 day of October, A. D. 1906.

T. M. REED,

[NOTARIAL SEAL.] *Notary Public, District of Alaska.*

[Endorsed:] 1636. No. — In the District Court for the District of Alaska, Second Division. Joseph Hammer, B. Schwartz and Otto Halla, Plaintiffs, vs. Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, Defendant. Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Oct. 15, 1906. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, Attorney for Plaintiff, Nome, Alaska. Filed — 190— — — —, Clerk. By — — —, Deputy. L.

5 In the U. S. District Court in and for the District of Alaska,  
 Second Judicial Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,  
 vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and  
 ANDREW EADIE, Defendants.

*Summons.*

The President of the United States of America, to F. H. Waskey, J. Crabtree J. Potter Whittren, and Andrew Eadie, Defendants in the above-named Cause, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiffs now on file in the office of the Clerk of the above-entitled court, at the city of Nome, in the District of Alaska, within 30 days of the service of this summons upon you, or judgment for want thereof will be taken against you; and you are hereby further notified that if you fail to answer the above complaint, the plaintiffs will apply to the court for the relief demanded therein.

Witness the Honorable Alfred S. Moore, Judge of the above-named Court, and the seal of the said Court hereto attached, this 15th day of October, in the year of our Lord one thousand nine  
 6 hundred and six, and of the Independence of the United States the one hundred thirty-first.

JNO. H. DUNN,

[COURT SEAL.] *Clerk of the District Court, District  
 of Alaska, Second Division.*

By ANGUS McBRIDE,  
*Deputy Clerk.*

UNITED STATES OF AMERICA,  
*District of Alaska, Second Division, ss:*

I hereby certify that I received the annexed summons on the 15th day of October, 1906, and thereafter on the same date I served the same at Nome, Alaska, upon J. Crabtree, J. Potter Whittren and Andrew Eadie, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein; after due and diligent search I was unable to find Frank H. Waskey within this district.

Returned this 15th day of October, 1906.

THOMAS CADER POWELL,

*United States Marshal.*

By JAS. J. STOKES, *Deputy.*

Marshal's Costs: 3 Services, \$18.00.

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer, B. Schwartz and Otto Halla, Plaintiffs, vs. Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, Defendants. Summons. Filed in  
 7 the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 16, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. T. M. Reed, Attorney for ———, Nome, Alaska. Filed — 190— ———, Clerk. By ———, Deputy. L.

In the United States District Court in and for the District of Alaska,  
 Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

F. H. WASKEY et al., Defendants.

*Demurrer [of F. H. Waskey et al. to Complaint].*

Comes now the defendants F. H. Waskey and J. M. Crabtree, in the above-entitled action, and file this their demurrer to the complaint of the plaintiffs therein filed on the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action against them or either of them.

Dated at Nome, Alaska, November 14th, 1906.

ALBERT FINK,

IRA D. ORTON,

*Attorneys for Demurring Defendants.*

[Endorsed:] #1636. In the United States District Court for the District of Alaska, Second Division. Jos. Hammer et al., Plaintiff, vs. F. H. Waskey et al., Defendant. Demurrer. Filed  
 8 in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 14, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. D. Albert Fink, Ira D. Orton, Attorneys for Def'ts.

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,  
 vs.  
 FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and  
 ANDREW EADIE, Defendants.

*Demurrer [of J. Potter Whittren et al. to Complaint].*

Comes now the defendants, J. Potter Whittren and Andrew Eadie and demur to the complaint of the plaintiffs filed herein and for cause of demurrer allege, that said complaint does not state facts sufficient to constitute a cause of action.

F. E. FULLER,  
 O. D. COCHRAN.

*Attorneys for Defendants Whittren and Eadie.*

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Demurrer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 15, 1906. Jno. H. Dunn, Clerk. By —, Deputy. F. E. Fuller & O. D. Cochran, Attys. for Defendants.

*[Order Overruling Demurrers, etc.]*

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special September, 1906, Term, Begun and held at the Town of Nome, in said District and Division, Sept. 24, 1906.

SATURDAY, Jan. 12, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.  
 John H. Dunn, Clerk.  
 Angus McBride, Deputy Clerk.  
 Geo. B. Grigsby, Acting U. S. Attorney.  
 Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

Demurrer of Waskey et al. to complaint and also the demurrer of Whittren et al. to complaint were submitted by counsel without argument and overruled, fifteen days being allowed to each defendant to answer.

10 In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiff,

vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and  
ANDREW EADIE, Defendants.

*Answer [of J. Potter Whittren et al.]*

Comes now the defendants, J. Potter Whittren and Andrew Eadie, and answering the complaint of the plaintiff filed herein, admit, deny and allege:

1.

Deny each and every allegation in said complaint contained, except that defendants are in the possession of the premises described in said complaint, as hereinafter alleged.

And for a further second separate answer and defense to said complaint, answering defendants allege:

1.

That during all the times mentioned in said complaint, the answering defendants were and now are the owners in fee, in the possession and entitled to the possession of the premises described in plaintiff's complaint.

2.

That the defendants, Waskey and Crabtree, are the lessee of said premises from the answering defendants herein.

11 Wherefore, having fully answered the complaint of plaintiffs the defendants, Whittren and Eadie, demand judgment against the plaintiffs that they are the owners in fee and entitled to the possession of the premises described in plaintiffs' complaint and for the costs and disbursements herein incurred.

F. E. FULLER,  
O. D. COCHRAN,

.. *Attorneys for Defendants Whittren and Eadie.*

UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Andrew Eadie, being first duly sworn, deposes and says: That he is one of the answering defendants named in the foregoing answer; that he has read the same, knows the contents thereof and that the same is true as he verily believes.

ANDREW EADIE.

Subscribed and sworn to before me, this 8th day of February, 1907.

[NOTARIAL SEAL.]

O. D. COCHRAN,  
*Notary Public in and for the District of Alaska.*

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants. Answer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 9, 1907. Jno. H. Dunn, Clerk. By —, Deputy. L. F. E. Fuller, O. D. Cochran, Atty. for Defendants Whittren and Eadie.

12 [Order Granting Leave to Add J. J. Chambers as a Party Defendant, etc.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special January, 1907, Term, Begun and Held at the Town of Nome, in said District and Division, Jan. 14, 1907.

SATURDAY, Feb. 16, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.

John H. Dunn, Clerk.

Angus McBride, Deputy Clerk.

Geo. B. Grigsby, Acting U. S. Attorney.

Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

On motion of Elwood Bruner, plaintiffs were granted leave to add J. J. Chambers as a party defendant, the defendant to be served with a copy of the complaint as amended, and the pleadings on file to be amended by interlineation.

13

*[Answer of F. H. Waskey et al.]*

In the United States District Court in and for the District of Alaska,  
Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

F. H. WASKEY et al., Defendants.

Come now F. H. Waskey and J. Crabtree, defendants in the above-entitled action, and for answer to plaintiffs' complaint, allege and deny as follows.

I.

Deny each and every allegation contained in plaintiffs' complaint.

II.

And for a further, separate and affirmative answer thereto, defendants allege:

First. That the defendants J. Potter Whittren and Andrew Eadie are and were at the time of the commencement of this action the owners in fee of the land and premises described in plaintiffs' complaint under and by virtue of a valid location thereof as a placer mining claim made by said J. Potter Whittren on the 1st day of January, 1902. That on the 1st day of January, 1902, the lands and premises described in plaintiffs' complaint, together with certain ground adjacent thereto, were vacant, unoccupied and unappropriated mineral land belonging to the Government of the

14 United States, and on said date the said J. Potter Whittren entered thereon and located the same as a placer mining claim under the laws of the United States, then and there doing and performing each and every act thereon required by law to make and perfect a valid mining location of Government placer mineral land. That said claim, as thus located by said Whittren, was by him named and called the "Bon Voyage," and contained at the time of the original location thereof by the said Whittren an area slightly in excess of twenty acres, but thereafter on November 11, 1903, the said Whittren made an accurate survey of said "Bon Voyage" claim, and slightly changed the position of three of his corner stakes by drawing them in, and as thus changed the said location contained no more than 20 acres.

Second. That upon the location of said "Bon Voyage" claim the said Whittren entered into the possession of the same, and thereafter until the 24th day of September, 1905, the said Whittren continued to be the sole owner in fee, in possession and entitled to the possession of said "Bon Voyage" claim; that on said 24th day of September, 1905, the said J. Potter Whittren, for a valuable consideration, by deed, in writing, sold and conveyed to the defendant Eadie an undivided one-half interest in said "Bon Voyage" claim, and since said last-mentioned date the said Whittren and the said Eadie have

been, and they now are the sole owners of said claim as tenants in common.

15 Third. That on the 11th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common, and were then and there in the sole quiet and exclusive possession of the same, and on said date the said Whittren and Eadie did by an instrument in writing lease, let and demise a portion of said claim to the defendant Waskey for the term to commence at the execution of said lease and ending on the 1st day of June, 1908; that the portion of said claim, so leased, demised and let to said defendant Waskey is bounded and described as follows:

All the following-described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1,320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1,320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the Recorder of said Cape Nome Recording District, in Book 99, at page 296, of the Records of said District.

That immediately upon the execution of said lease the defendant Waskey entered upon said portion of said claim and  
16 commenced to mine and prospect the same for gold in accordance with the terms of said lease and is still so engaged; that the defendant Waskey has at all times kept and performed, and is now keeping and performing all the terms of said lease on his part to be kept and performed; that a true copy of said lease is hereunto annexed, marked Exhibit "A," and made a part of this answer.

Fourth. These defendants further allege that afterwards, to wit, on the 20th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common and were then and there, together with the defendant Waskey as lessee of the portion thereof hereinbefore described, in the sole, quiet and exclusive possession of the said claim, and on the said 20th day of June, 1906, the said Whittren, Eadie and the defendant Waskey made and entered into a certain lease and contract of the remaining portion of said mine for the term commencing on said 20th day of June, 1906, and ending on the 20th day of June, 1908; that the remaining portion of said mine described in said lease and contract last hereinabove referred to is described as follows:

The easterly 440 feet of said mining claim, being all of said claim not heretofore leased by the said Eadie and the said Whittren to the said Waskey.

That immediately upon the execution of said contract and lease, the defendants Eadie and Waskey entered upon said portion of

17 said claim described therein and commenced to mine and prospect the same for gold in accordance with the terms of said lease and they are still so engaged; that the defendants Waskey and Eadie have at all times kept and performed and are now keeping and performing all the terms of said contract and lease on their part to be kept and performed. That a true copy of said contract and lease is hereto annexed, marked Exhibit "B," and made a part of this answer.

Fifth. The defendants further allege that they have hereinbefore set forth the nature and duration of their estate in the real property described in plaintiffs' complaint, and of their license and right to the possession thereof, and further allege that they are in the possession of said property under and by virtue and pursuant to the two leases and contracts, Exhibits "A" and "B," hereinbefore mentioned.

Sixth. That said "Bon Voyage" claim as located by said J. Potter Whittren on the 1st day of January, 1902, and as surveyed and marked by him on the 11th day of November, 1903, contained within its exterior boundaries the whole of the premises described in plaintiffs' complaint, alleged therein to be the property of the plaintiffs.

Wherefore, having fully answered, these defendants pray to go hence dismissed with judgment for their costs.

ALBERT FINK AND  
IRA D. ORTON,

*Attorneys for Defendants, Frank H. Waskey  
and J. Crabtree.*

18 UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

J. M. Crabtree, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the above and foregoing answer to plaintiffs' complaint and knows the contents thereof, and believes the same to be true.

J. M. CRABTREE.

Subscribed and sworn to before me, this 20th day of February, 1907.

[NOTARIAL SEAL.]

IDA G. CHAQUETTE,  
*Notary Public in and for the District of Alaska,  
Residing at Nome.*

EXHIBIT "A" [TO ANSWER OF F. H. WASKEY ET AL.].

#36729.

This indenture, made this eleventh day of June, in the year nineteen hundred and six, between Andrew Eadie and J. Potter Whittren, both of Nome, Alaska, lessors, and F. H. Waskey, of the same place, lessee, witnesseth:



That the said lessors, for and in consideration of the rents, royalties, covenants, and agreements hereinafter reserved and contained and by the said lessee to be paid, kept and performed, do hereby lease, demise, and let unto the said lessee all the following-

19 described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome Recording District, in book 99, at page 296, of the records of the said district.

To have and to hold all and singular the said demised premises, together with the appurtenances, unto the said lessee for the term commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

1. To enter upon the said premises within five days from the date hereof, and thereafter to prospect, work, and mine the same in good and miner-like manner, so as to take out the greatest possible amount of gold and gold-dust therefrom, with  
20 due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and to keep all shafts and tunnels, drifts and stopes clear and in good and safe condition.

3. To allow the said lessors, and their agent or agents, at all times, to enter upon and into all parts of the said premises, for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim, during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust, and other precious minerals and metals mined or extracted from the said premises during the term of this lease and to pay and deliver to the said lessors such royalty out of, and immediately after, each and every cleanup.

21 7. To allow no person or persons not in privity with the said parties hereto to take or hold possession of the said premises, or any part thereof, under any pretense whatever, during the said term.

8. Not to assign this lease or any interest herein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the possession of the said premises, X.....X, in good order and condition for continued future mining, without demand or further notice, on said first day of June, 1906, or at any time previous upon demand for forfeiture.

It is expressly agreed that, upon the violation by the said lessee of any covenant or agreement herein contained, this lease and the term hereof, shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators, and assigns of the lessors, and, at the option of the lessors, the executors, administrators, and assigns of the said lessee.

22 In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

ANDREW EADIE.	[SEAL.]
J. POTTER WHITTREN.	[SEAL.]
F. H. WASKEY.	[SEAL.]

Done in triplicate.

Signed, sealed and delivered in the presence of—

F. E. FULLER.  
A. G. BLAKE.

DISTRICT OF ALASKA.

*Cape Nome Precinct, ss:*

This is to certify, that on this 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 11th day of June, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,  
*Notary Public for Alaska.*

Filed for record Aug. 22, 1906, 2:20 P. M. request of F. H. Waskey. F. E. Fuller, Recorder. ———, Deputy.  
(Vol. 164, page 133.)

23 UNITED STATES OF AMERICA,  
*District of Alaska, Precinct of Cape Nome, ss:*

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36729, the same being Agreement between Andrew Eadie, and J. Potter Whittren, lessors, and F. H. Waskey, lessee, as the same appears of record in Volume 164, at page 133 thereof, of the records of my office.

Witness my hand and the seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER,

*Recorder.*

By F. R. COWDEN,

*Deputy.*

EXHIBIT "B" [TO ANSWER OF F. H. WASKEY et al.].

#36869.

*Agreement.*

This agreement, made this 20th day of June, in the year nineteen hundred and six, by and between Andrew Eadie, J. Potter Whittren, and F. H. Waskey, all of Nome, Alaska, Witnesseth:

24 Whereas, the said Eadie and Whittren are the owners of the Bon Voyage Placer Mining Claim, situate in Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296, of the Records of said District;

And whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey:

Now, therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one days from the date hereof, and thereafter to prospect, work and mine the same in good and minerlike manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement,

To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition;

25 To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren or his agent due notice of each and every cleanup.

It is agreed that of all the gold, gold-dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth ( $\frac{1}{8}$ ) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ( $\frac{1}{8}$ ) part to the said Eadie, and the remainder shall be retained by, and equally divided between, the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under this agreement; the expenses of first locating pay, however, to be borne solely by said Waskey.

In witness whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN. [SEAL.]

ANDREW EADIE. [SEAL.]

F. H. WASKEY. [SEAL.]

Signed, sealed and delivered in the presence of—

P. D. OVERFIELD.

26 DISTRICT OF ALASKA,  
*Cape Nome Precinct, ss:*

This is to certify that on this 30th day of August, A. D. 1906, before me, the undersigned, a notary public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 30th day of August, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,  
*Notary Public for Alaska.*

Filed for record Aug. 30, 1906, 2:50 P. M.  
Request of F. H. Waskey.

F. E. FULLER,  
*Recorder.*

— — —, *Deputy.*

(Vol. 164, page 138.)

UNITED STATES OF AMERICA,

*District of Alaska, Precinct of Cape Nome, ss:*

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full, and complete copy of Instrument numbered 36869, the same being agreement between Andrew Eadie, J. Potter Whittren and F. H. Waskey, as the same appears of record in volume 164, at page 138 thereof, of the records of my office.

Witness my hand and seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER,

*Recorder.*

By F. R. COWDEN,

*Deputy.*

UNITED STATES OF AMERICA,

*District of Alaska, ss:*

Due service of the within answer of F. H. Waskey and J. Crabtree is hereby accepted at Nome, Alaska, this 20th day of Feby., 1907, by receiving a copy thereof.

\_\_\_\_\_,  
*Atty's for Plff's.*

[Endorsed:] 1636. Original. In the District Court for the District of Alaska, Second Division. Joseph Hammer, et al., Plaintiffs, vs. F. H. Waskey, et al., Defendants. Answer of Defendants J. M. Crabtree and F. H. Waskey. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Feb. 20, 1907. Jno. H. Dunn, Clerk. By \_\_\_\_\_, Deputy. Z. Albert Fink and Ira D. Orton, Attorneys for Def'ts. Crabtree and Waskey.

28 In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,

vs.

F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE, Defendants.

*Reply [to Answer of F. H. Waskey et al.].*

Come now the above-named plaintiffs and replying to the answer of F. H. Waskey and J. Crabtree filed herein, admit, deny and allege:

1.

Deny each and every allegation, matter and thing contained in said defendants' further, separate and affirmative answer, save and except plaintiffs admit that said defendants are in possession of the premises, described in plaintiffs' complaint herein.

And for a further, separate and affirmative reply to the answer of said defendants, plaintiffs allege:

## 1.

That between the 31st day of December, 1902, and the 1st day of January, 1904, no work or labor was performed, or improvements made on or for the said Bon Voyage mining claim, location set forth in the answer of said defendants F. H. Waskey and J. Crabtree, which said alleged location includes the premises in controversy by J. Potter Whittren, the alleged locator thereof, or by any person or persons acting for or in his behalf to the value of One Hundred Dollars, or any other sum whatsoever. Nor did the said J. Potter Whittren, or any person acting for him or in his behalf, after the 31st day of December, 1903, resume work upon said mining claim. That thereupon and before said J. Potter Whittren or any person acting for or in his behalf had resumed work on said placer mining claim the plaintiff B. Schwartz located that certain placer mining claim known as and called the Golden Bull placer mining claim, which includes within its exterior boundaries all of the premises in controversy and described in plaintiffs' complaint herein, in pursuance of the mineral land laws of the United States, and did all and singular each and everything requisite and necessary to be done in and about the premises to make a valid mining location under the mineral land laws of the United States, and the local rules, regulations and customs of the District wherein said claim was situated, whereby the claim of said defendant J. Potter Whittren in and to said premises became forfeited, and the plaintiff B. Schwartz became the owner thereof in fee under and by virtue of a valid and subsisting mining location made as aforesaid, and ever since said time any title, claim or right of possession that the said defendant J. Potter Whittren and his successors in interest had in and to said premises became forfeited as aforesaid, and plaintiff B. Schwartz and his co-plaintiffs to whom he has conveyed a portion of his interest in said claim, ever since have been and now are the owners in fee and entitled to the possession of the said premises, and the whole thereof.

Wherefore plaintiffs having fully replied to the answer of said defendants, demand judgment as set forth in plaintiffs' complaint.

T. M. REED,  
ELWOOD BRUNER,  
J. ALLISON BRUNER,  
*Attorneys for Plaintiffs.*

UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Otto Halla, being first duly sworn, deposes and says: That I am one of the plaintiffs in the above-entitled action; that I have heard read the foregoing reply; know the contents thereof, and the same is true as I verily believe.

OTTO HALLA.

Subscribed and sworn to before me this 28th day of March, A. D. 1907.

[NOTARIAL SEAL.]

T. M. HOSKING,  
*Notary Public in and for the District of Alaska.*

UNITED STATES OF AMERICA,  
*District of America, ss:*

Due service of the within Reply is hereby accepted, in the District of Alaska, this — day of March, 1907, by receiving a duly certified copy of the same.

IRA D. ORTON,  
*Attorney for —.*  
O. D. COCHRAN,  
M. S.,  
*Att'ys for Whittren & Eadie.*

31 [Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et al., Plaintiffs, vs. F. H. Waskey et al., Defendants. Reply to Answer of F. H. Waskey and J. Crabtree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 28, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, Elwood Bruner, J. Allison Bruner, Attorney- for Pl't'fs, Nome, Alaska.

In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARZ, and OTTO HALLA, Plaintiffs,  
vs.  
F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE, Defendants.

*Reply [to Answer of J. Potter Whittren et al.].*

Come now the above-named plaintiffs and replying to the answer of J. Potter Whittren and Andrew Eadie filed herein, admit, deny and allege:

1.

Deny each and every allegation, matter and thing contained in said defendants' further, second, separate answer and defense.

And for a first, further, separate and affirmative reply to the answer of said defendants, plaintiffs allege:

32

1.

That they are informed and believe that the defendants J. Potter Whittren and Andrew Eadie claim the property described in plaintiffs' complaint as a placer mining claim, located under the laws of the United States.

That said J. Potter Whittren claims to have located the said premises on the first day of January, 1902. That at the time the

said J. Potter Whittren claims to have located the said premises the same were not open for location; that the said premises had theretofore been located and occupied by other persons who had entered thereon prior to the attempted location thereof by the said J. Potter Whittren, and located the same as a placer mining claim in manner provided by the laws of the United States. That at the time of the said J. Potter Whittren's attempted location of said premises, the said prior locations thereof were still valid and subsisting, and had not been abandoned or forfeited.

And for a second, further, separate and affirmative reply to the answer of said defendants J. Potter Whittren and Andrew Eadie, plaintiffs allege:

## 1.

That plaintiffs are informed and believe that the said defendants J. Potter Whittren and Andrew Eadie claim the property described in plaintiffs' complaint as a placer mining claim located under the laws of the United States known as and called the Bon Voyage.

That the said J. Potter Whittren claims to have located the said premises on the first day of January, 1902.

33

## 2.

That between the 31st day of December, 1902, and the 1st day of January, 1904, no work or labor was performed or improvements made on or for the said Bon Voyage Mining Claim, which said alleged location includes the premises in controversy by said defendants or any person or persons acting for them or in their behalf to the value of One Hundred Dollars or any other sum whatsoever. Nor did the said defendants or any persons acting for them or in their behalf after the 31st day of December, 1903, resume work upon said mining claim; that thereupon and before said defendants or any person acting for or in their behalf had resumed work on said placer mining claim, the plaintiff B. Schwartz located that certain placer mining claim known as and called the Golden Bull placer mining claim, which includes within its exterior boundaries all of the premises in controversy and described in plaintiffs' complaint herein, in pursuance of the mineral land laws of the United States, and did all and singular each and every thing requisite and necessary to be done in and about the premises to make a valid mining location under the mineral land laws of the United States, and the local rules, regulations and customs of the District wherein said claim was situated, whereby the claim of said defendants in and to said premises became forfeited and the plaintiff B. Schwartz became the owner thereof in fee under and by virtue of a valid and subsisting mining location made as aforesaid, and ever since said time any title, claim or right of possession that the said defendants had in and to said premises became forfeited as aforesaid, and plaintiff B. Schwartz and his co-plaintiffs, to whom he has conveyed a portion of his interest in said claim, ever since have been and now are the owners in fee and entitled to the possession of the said premises, and the whole thereof.

34



Wherefore, plaintiffs having fully replied to the answer of said defendants, demand judgment as set forth in plaintiffs' complaint.

T. M. REED,  
ELWOOD BRUNER,  
J. ALLISON BRUNER,  
*Attorneys for Plaintiffs.*

UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Otto Halla, being first duly sworn, deposes and says: That I am one of the plaintiffs in the above-entitled action; that I have heard read the foregoing reply, know the contents thereof and the same is true as I verily believe.

OTTO HALLA.

Subscribed and sworn to before me this 28th day of March, A. D. 1907.

[NOTARIAL SEAL.]

T. M. HOSKING,  
*Notary Public in and for the District of Alaska.*

35 UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Due service of the within Reply is hereby accepted, in the District of Alaska, this — day of March, 1907, by receiving a duly certified copy of the same.

O. D. COCHRAN,  
M. S.,  
*Attorney for Whittren and Eadie.*  
IRA D. ORTON,  
*Att'y for Waskey & Crabtree.*

[Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et. al., Plaintiffs, vs. F. H. Waskey et al., Defendants. Reply to Answer of J. Potter Whittren and Andrew Eadie. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Mar. 28, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, J. Allison Bruner and Elwood Bruner, Attorney- for Pl'tffs, Nome, Alaska.

In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,  
vs.  
FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE, Defendants.

36 *Verdict.*

We, the jury in the above-entitled action, find a verdict in favor of the plaintiffs; that the plaintiffs are entitled to the possession of

the lands and property described in their complaint, described as follows, to wit:

Commencing at the northeast corner of the Golden Bull Placer Mining Claim; thence running by magnetic courses south  $27^{\circ} 15'$  E. 630 ft.; thence south  $45^{\circ}$  W. 695 ft., thence north  $27^{\circ} 30'$  W. 495 ft.; thence north  $35^{\circ} 10'$  east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska.

That the plaintiffs are the owners in fee and the owners of the right to the possession of said property, and entitled to the possession of the same, and the whole thereof.

We further find that the plaintiffs are entitled to recover damages against the defendants, and assess the amount of damages in the sum of 75 cents.

BERNARD O'REILLY, *Foreman.*

37 [Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants. Verdict. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Sep. 9, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. J. Allison Bruner, Elwood Bruner, T. M. Reed, Attorney- for Pl't'ffs, Nome, Alaska.

*[Motion to Set Aside Verdict and for a New Trial.]*

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

FRANK H. WASKEY et al., Defendants.

Come now the defendants in the above-entitled action and move the Court to set aside the verdict in the above-entitled action and grant a new trial therein, upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict.

II.

Errors in law occurring at the trial and excepted to by the defendants and each of them, as follows:

38 Error of the Court in directing the Jury to find a verdict for the plaintiffs and against the defendants for the land in controversy.

ALBERT FINK,  
IRA D. ORTON,  
F. E. FULLER,  
O. D. COCHRAN,  
*Attorneys for Defendants.*

Service admitted Sept. 11, 1907.

ELWOOD BRUNER,  
T. M. REED,  
J. ALLISON BRUNER,  
*Att'ys for Pl't'ffs.*

[Endorsed:] #1636. Original. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Motion for New Trial. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sept. 11, 1907. Jno. H. Dunn, Ira D. Orton, Attorney- for Defendants.

39 [*Minutes Relative to Overruling of Motion for New Trial, etc.*]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special October, 1907, Term, Begun and Held at the Town of Nome, in said District and Division, October 7, 1907.

WEDNESDAY, November 6, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.  
John H. Dunn, Clerk.  
Angus McBride, Deputy Clerk.  
Geo. G. Grigsby, Acting U. S. Attorney.  
Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

The Court rendered a decision overruling motion for new trial. On motion of Ira D. Orton, defendants were granted thirty days' additional time to file bill of exceptions and a stay of execution for same length of time.

40 In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARZ, and OTTO HALLA, Plaintiffs,  
vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and  
ANDREW EADIE, Defendants.

*Judgment.*

The above-entitled action having, on the 6th day of September, 1907, regularly come on for trial, Elwood Bruner, J. Allison Bruner and T. M. Reed appearing as attorneys for plaintiffs; Albert Fink, Ira D. Orton, C. D. Murane and W. A. Gilmore appearing for defendants, Frank H. Waskey and J. Crabtree; and F. E. Fuller and O. D. Cochran appearing for defendants J. Potter Whittren and Andrew Eadie; and a jury of twelve persons having been regularly impaneled and sworn to try said action, and witnesses on behalf of the parties thereto having been sworn and examined and documentary evidence introduced; and after hearing all the evidence and the Court having instructed said jury to find a verdict for the plaintiffs, the said jury did find by their verdict for the plaintiffs and against the defendants, as follows:

41 "We, the jury in the above-entitled action, find a verdict in favor of the plaintiffs; that the plaintiffs are entitled to the possession of the lands and property described in their complaint, described as follows, to wit:

Commencing at the northeast corner of the Golden Bull Placer Mining Claim, thence running by magnetic courses south  $27^{\circ} 15'$  630 ft.; thence south  $45^{\circ} W.$  695 ft.; thence north  $27^{\circ} 30' W.$  495 ft.; thence north  $35^{\circ} 10'$  east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska.

That the plaintiffs are the owners in fee and the owners of the right to the possession of said property, and entitled to the possession of the same, and of the whole thereof.

We further find that the plaintiffs are entitled to recover damages against the defendants, and assess the amount of damages in the sum of seventy-five cents.

BERNARD O'REILLY,  
*Foreman."*

Wherefore, by virtue of the law, and by reason of the premises aforesaid,

It is ordered and adjudged that the plaintiffs are the owners in

fee under and by virtue of a valid and subsisting mining location of the following described placer mining claim, to wit:

42 "Commencing at the northeast corner of the Golden Bull Placer Mining Claim, thence running by magnetic courses south  $27^{\circ} 15'$  E. 630 ft.; thence south  $45^{\circ}$  W. 695 ft.; thence north  $27^{\circ} 30'$  W. 495 ft.; thence north  $35^{\circ} 10'$  east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska."—being the premises described in the complaint of plaintiff and involved in the trial of this action.

It is further ordered and adjudged that the plaintiffs are the owners of the right to the possession and are entitled to the possession of the aforesaid placer mining claim, and the whole thereof, and,

It is further ordered and adjudged that the plaintiffs do have and recover of defendants damages in the sum of seventy-five cents.

It is further ordered and adjudged that plaintiffs do have and recover of defendants Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, and each of them, the possession of the aforesaid placer mining claim, and the whole thereof, and that plaintiffs do have and recover from the defendants Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, jointly and severally the sum of — Dollars and — cents, taxed as costs and disbursements in the above-entitled action.

43 Done in open court this 9th day of November, A. D. 1907.

ALFRED S. MOORE,  
*District Judge.*

[Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants, Judgment. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 16, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Elwood Bruner, J. Allison Bruner, T. M. Reed, Attorney for Plaintiffs. Nome, Alaska. Comp. Vol. 5, Orders and Judgments, p. 563. McB. J. D. 2, page 45.

*[Bill of Exceptions.]*

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,  
vs.  
FRANK H. WASKEY et al., Defendants.

The above-entitled action coming on regularly for trial on the 6th day of September, 1907, before the Hon. Alfred S. Moore, Judge of

the above-entitled court, whereupon a jury of twelve persons were duly impaneled.

44 The plaintiffs were represented by Messrs. Elwood Bruner, J. Allison Bruner and T. M. Reed, their attorneys, and the defendants by Messrs. Albert Fink, O. D. Cochran, W. A. Gilmore, Ira D. Orton and C. E. Murane.

The following were the proceedings at the trial:

After the jury were sworn, the opening statement for the plaintiffs was made by Mr. Elwood Bruner, and for the defendants by Mr. O. D. Cochran.

*(Testimony of B. Schwartz.)*

Thereupon B. SCHWARTZ, one of the plaintiffs, called as a witness on his own behalf, after being duly sworn, testified as follows:

I am 40 years of age, a miner by occupation. Have been in Alaska since '97. I know Otto Halla. I have known him since '98. I had a talk with Otto Halla with reference to locating a claim in the Cape Nome District, with reference to the Golden Bull. This was on the 20th of December, 1903. As a result of that talk I went out there on the 27th or 28th of December, 1903. I examined the Golden Bull on that day. Before that time I had also examined the ground. I was on the ground first in '99. I made a discovery of gold upon the claim in 1901, towards fall or September. I made a discovery of gold upon the ground. The next day after the 28th of December, 1903, or the day following, I went over there with Otto Halla. I wanted Halla to show me the stake that is marked 3 on the map. I had found the other stakes 1, 2 and 4.

When I went out there with Mr. Halla he showed me stake 3. We went around the claim and went home again.

45 I next went on the ground on the 31st of December, for the purpose of staking that claim, the Golden Bull. I did not find within the limits of the Golden Bull any stake of any other claim. I staked the Golden Bull at 12 o'clock, January 1, 1904. I shaved off the stake that was standing at the point 1 (referring to map, Plaintiffs' Exhibit 1). The stake was standing there before designating the corner of the Golden Bull, and I wrote on it the initial stake of the Golden Bull, the date, and my name.

I then went to the point marked 4 on the map (referring to the same map), shaved off the stake that was standing there before, wrote on it northwest corner, Golden Bull, the date, 1st January, 1904.

Then I went to point marked 3 on the map, shaved off another stake that was standing there and wrote on it southwest corner, Golden Bull, and the date.

From there I went to point marked 2 on the same map and shaved off a stake standing there, and wrote on that southeast corner Golden Bull, the 1st of January, 1904.

The stakes that I shaved off were the old stakes of the Golden Bull staked in 1902 by Halla.

At this point the following question was asked the witness:

Q. State whether or not it was before or after 12 o'clock the night of December 31st that you staked that.

A. At 12 o'clock exactly.

The witness, continuing, testified: I placed my location notice on the stake at the point 1 on this map. I placed my location notice on that stake when I shaved it off. I put the location notice on the initial stake and left it there.

At this point a paper was shown the witness and he testified concerning it that it was a copy of the notice posted by him, and that he afterwards placed it of record in the Recorder's Office of the Cape Nome Recording District. The paper was thereupon admitted in evidence and read to the jury, marked Plaintiffs' Exhibit No. 2, and was, with the endorsements thereon, in words and figures as follows:

DEFENDANTS' [PLAINTIFFS'?] EXHIBIT 2.

No. 25053.

*Notice of Location.—Placer Claim.*

Notice is hereby given that the undersigned, having complied with all the Requirements of the Revised Statutes of the United States, claims by right of discovery of Gold and location the following within the boundaries hereinafter described Placer Mining Ground of 20 acres, to wit:

Commencing at this the Initial stake where a copy of this notice is posted, being also the N. E. corner of the claim, and being also identical with the S. E. corner of the Roosevelt claim, thence in a Westerly direction to 1320 feet to the N. W. corner of the claim, being a sod monument of about 3 feet high, with a stake in the center, thence in a Southerly direction 660 feet to the S. W. corner of the claim being identical with the N. W. cor. of the Golden Calf Claim, thence in an Easterly direction to the S. E. cor. of the claim, 1320 feet, being identical with the N. E. cor. and initial stake of the Golden Calf claim, thence in a Northerly direction 660 feet to the Initial stake or place of beginning.

This claim is situated on the divide between Newton Gulch a trib. to Dry Creek and Fox Creek a trib. to Otter creek a trib. to Nome River, in the Nome Mining District, District of Alaska, and being known as the Golden Bull Claim. This claim is identical-y the same as located by M. Roth in the year 1902.

Located this the 1st day of January, 1904.

Locator: B. SCHWARZ.

Witness:

OTTO HALLA.

Filed for record at request of B. Schwartz, Jan. 20, 1904, at 3:10 P. M.

T. M. REED, *Recorder.*  
W. W. SALE, *Deputy.*

(Vol. 133, page 423.)

UNITED STATES OF AMERICA,  
*District of Alaska,*  
*Precinct of Cape Nome, ss:*

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 25053, the same being notice of location—Placer

48 Claim—of Golden Bull, as the same appears of record in Volume 133, at page 423 thereof, of the records of my office.

Witness my hand and the seal of the said office this 2d day of May, 1907.

[SEAL.]

F. E. FULLER, *Recorder,*  
 By F. R. COWDEN, *Deputy.*

[Endorsed:] "Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, May 6, 1907, Jno. H. Dunn, Clerk. By ———, Deputy."

The witness then testified further as follows: Otto Halla was with me at this time. Halla located another claim that evening. Halla became interested in this claim, the Golden Bull, at the time I staked it. He had a half interest. I conveyed him a half interest, as I had agreed. Mr. Hammer has a quarter interest.

On cross-examination the witness testified as follows:

Mr. Halla located one of the claims that night, the Golden Calf. That was the claim marked Coffee on this map.

At this point in the trial two maps were admitted in evidence, without objection, one introduced by the plaintiffs, marked Plaintiffs' Exhibit No. 1, and the larger map by the defendants, marked Exhibit No. X.

(Here follow maps marked pp. 49 & 50.)



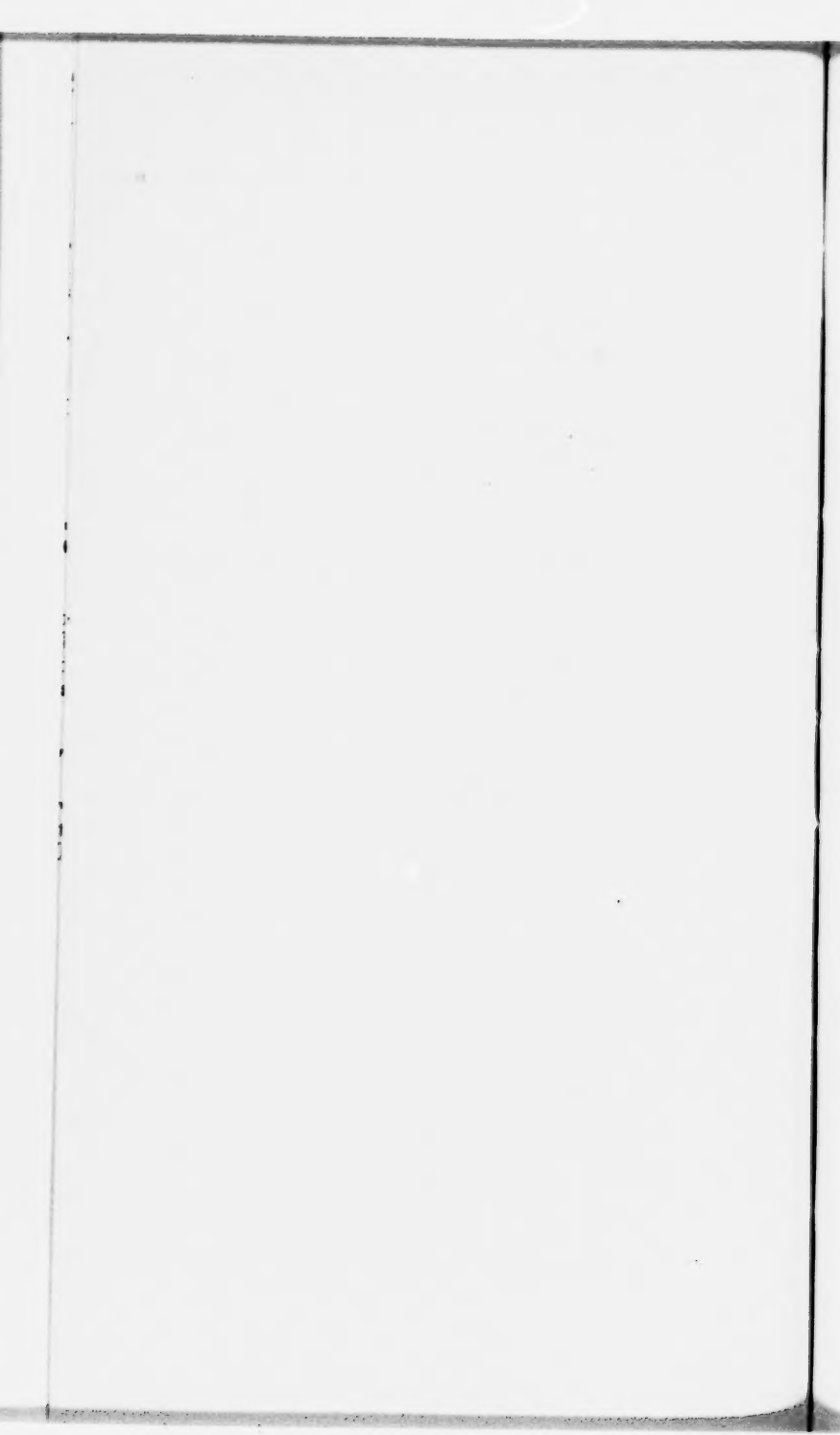
**CHARTS**

**TOO**

**LARGE**

**FOR**

**FILMING**



51 The witness then proceeded to testify: Referring to Plaintiffs' Exhibit No. 1, the Golden Calf began at point 2 and came to the point which is marked 5, then to the point which is marked 6, then over to the point which is marked 7. Mr. Halla located no other ground that night, January 1, 1904. I was out there the first time in December, '99. I was looking over the country. I attempted to stake one claim, but I never recorded it. I don't know the exact location. I put in one stake but never marked the boundaries, nor ever recorded it. I called it Vasudeva. That is a Sanskrit word and means the highest maxim in man, is identical with the highest maxim in the world at large. I wrote out the location notice and put it on a stake, subsequently abandoned the ground.

I have been mining 12 or 13 years in Alaska and elsewhere. After '99 I was first on the Golden Bull in 1901. I went out to stake a claim but didn't stake any. The next time was in 1903. In 1901 when I was out there I panned and found prospects. I was looking for an old channel. I had it in my mind that the country looked like there would be an old channel from Newton Gulch. I had looked the country over pretty well in '99. I don't know what brought upon me the idea that it might be an old channel  
52 from Newton Gulch going through there, but I went out to look over the country and see if the country looked like if an old channel would go through there, and when I came over there things didn't look as good as I thought it would look to me before I left town, that was the reason I didn't stake.

The location I made in 1904 I predicated on the discovery I made in 1901.

At the time we located we left town about half-past ten or eleven at night, went out with Otto Halla. He wanted to be a witness at the staking of the claim. He told me he had staked before, told me where it was. He told me to go out to stake it in my name, give him a half interest, and I agreed to do that. That was the substance of it, and that just happened to be the place where I had found gold in 1901.

On the stake that I shaved off at the northeast corner of the claim, there was on it marking designating that it was the northeast corner of the Golden Bull and the name Max Roth, I believe, and nothing else that I can remember. I first saw this stake in December, 1903. It was a round driftwood stake, 2½ inches through and 2½ feet high. There was a Roosevelt stake at the same point and a stake of the Pioneer Bench. There was no other stake that I remember.

At this point in the examination of the witness the following questions were asked and the witness made the following answers:

Q. No Bon Voyage stake there?

53 A. No—yes, there was a 2 by 2 stake there, about a foot high, seemed to be a new stake, I didn't know what stake it was.

Q. Did you look at it?

A. Yes, I looked at it.

Q. Nothing at all written on it?

A. I think there was northeast corner.

Q. Was that all?

A. That was written on the stake.

Q. There might have been B. V.?

A. I don't recollect it.

Q. Cut in with a knife or marked with a pencil?

A. I don't remember whether it was or not.

The witness then continued to testify: I shaved off the old stakes of the Golden Bull. Halla was with me. Told me I could take his stakes. He went out there to show me the claim. After I had trimmed it off I wrote on it initial stake of the Golden Bull the first of January, 1904, and my name, signed my name to it—B. Schwarz.

From point 1 on the map I went to point 4. Found another Golden Bull stake there, shaved it off. I believe it was a kind of a board stake, taken from a dry goods box or potato crate. Otto Halla was with me. From there I went to the point No. 3 on the map. Found a stake there marked Golden Bull, shaved it off the same way, and marked the same kind of writing on it. It was a stake taken from an old barrel. I then went to the point 2 and did the same thing.

54 OTTA HALLA, a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

My name is Otto Halla. I am a miner by occupation. Have been since '99 in Nome. I am acquainted with the ground between Newton Gulch and Fox Creek, shown on the map. I became acquainted with it in 1902, July. In 1902 I spent about eight days in that neighborhood, examining the stakes, and examining the ground with a view of locating. I have known Mr. Schwarz since '98 in Dawson. I saw him in 1902. Had a conversation with him in 1903 with reference to locating the claim, the Golden Bull. I have known the Golden Bull since 1902, July 31st, having located it on that day for Max Roth. He left the country in 1903 and has not been back since. In 1903 I had a talk with Mr. Schwartz with reference to that claim. I had put out monuments and located the ground and had prospected the ground. In 1903 I took Mr. Schwartz to the ground and showed him the location of the Golden Bull. I was present when Schwartz staked it. That was on January 1st, 1904, between the hours of 12 o'clock and 1 A. M. We went out together from Nome. Mr. Schwartz commenced at point 1 (indicating on Map) the northeast corner. He adopted the same stakes I had used there for the Golden Bull location of Max Roth, where he placed his location notice, which I had prepared the evening before, and he went to No. 4, then to 3, and then to No. 2. He put the location notice on the first stake, made a slit in it, a beechwood stake. He marked  
55 that stake Initial Stake and northeast corner of the Golden Bull, and signed his name to it, and I signed my name as a witness on the stake. I believe I signed the others. I would not be sure. There was an agreement between myself and Mr. Schwarz as to the ownership of the claim. This agreement was that he was to give me a half interest for assisting him in locating the

claim. This agreement was fulfilled. Prior to that time in July, 1902, I had discovered gold in the claim. I panned, made a discovery of gold, not very far from stake No. 3, about 250 feet east from stake No. 3. The driftwood stake was about 2½ feet long, round, and about 2 inches in diameter. At No. 4 there was a stake, a piece of a potato crate, about 2 feet high, flat and about 3 inches wide, and about a half inch through, placed in a monument; at point 3 there was a barrel stave, which I found in 1902 on Fox Creek, and at point 2 was also a piece of a potato crate and these were all placed in permanent mounds. The location as made by Schwarz in 1904 was identical with the one made by me in 1902 for Max Roth. The stakes were placed in the same mounds. On this claim Mr. Roth did not do the assessment work.

Upon cross-examination, the witness testified as follows: I am a mining operator rather than a miner. I do not own 13,000 acres.

I do not know what I own. I first became acquainted with  
56 the ground covered by the Golden Bull in July, 1902. I

made a location of it for Max Roth July 31, 1902, I had an agreement at that time that I should get a half interest in the property but I didn't get it. I located the ground as designated by the figures 1, 4, 3 and 2 on Plaintiffs' Exhibit 1. No assessment work was done on the Max Roth location in 1903. I expected the ground to become open. Mr. Schwarz came to me about the ground. I told him about this Golden Bull. I told him that there was a piece of property some parties wouldn't do the assessment work on that he may relocate it on Jan. 1st. I was to have a half interest with Max Roth under that location, but never got it. I thought the ground was likely valuable. I didn't locate it in my own name for several reasons, one was I realized I could not do the assessment work on all the claims I have located in that neighborhood without some financial assistance, and by getting in somebody that will do the work I expected that I would be able to hold the ground, that I would be able to divide up the ground, the agreement with the partners in very many cases was that they should open up the ground, that they should dig some holes and open up the ground, open up the country. That is the principal reason. I have not been actually financially able to look after all my property alone. I didn't know how many properties I have. [It is not a fact that Mr. A. McB.

Schwarz and myself went in to forfeit the loca-  
57 tion of Max Roth and beat him out of his half interest.]\* I did not intend to do the assessment work on this ground in 1903. I never got the deed from Max Roth, consequently I did not own my interest in it. I did not own any interest in the Golden Bull at the time I told Schwarz to locate it. My contract with Roth was not complied with. The agreement was not lived up to. Under the agreement I had with Schwarz I had a half interest in this ground for assisting him, helping in the location. I took him out and showed him the stakes about the 28th day of December, 1903, and again on the 1st day of January, 1904. I went around with him to

---

[\* Words and figures enclosed in brackets erased in copy.]

all the stakes, pointed them out to him, I didn't assist in shaving the stakes. He shaved them himself. I knew he was going to locate it in his own name. The evening before it was located, in my cabin, I wrote out the location notice on the typewriter, a copy of which is offered in evidence. I believe he made the deed to me in March, the 23d of March, 1904.

The deed of a one-half interest in the property from B. Schwarz to Otto Halla was here produced, and the witness further testified:

This deed was made in fulfillment of the agreement I had with him. The original agreement was not in writing. I had been over this ground a great deal, examining the country and the stakes, with a view to making the locations.

Upon redirect examination the witness testified as follows:

58 Q. You was asked with regard to this talk that you had with Mr. Schwartz going out there, in regard to that, the conversation in regard to that, was there anything said with regard to the discovery of gold made upon the claim?

Mr. ORTON: Objected to as leading, hearsay, immaterial and incompetent.

Q. As to whether there has been any communication of the fact by Halla to Schwartz that he had made a discovery of gold?

Mr. ORTON: Objected to as immaterial, irrelevant, incompetent, hearsay and leading.

The COURT: Overruled.

Mr. ORTON: Exception taken by the defendants.

A. I told Schwartz that I had made a discovery of gold in 1902

The plaintiffs here rested their case.

The foregoing is the substance of all the testimony introduced on behalf of the plaintiffs.

J. POTTER WHITTREN was thereupon called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

I am engaged in mining and surveying. I have lived in Nome since 1900. I know a claim in this District called the Bon Voyage. I first became acquainted with this ground in the latter part of September, 1901. I knew the ground was open out there, a particular portion of the ground, and I went out to examine it and  
59 found it. That was in the latter part of September or the early part of October, 1901. At that time I staked about 25 acres of it. I guess I staked a big claim. Made a discovery, put up the stakes, and came back to Nome. That was in September, 1901, or the early part of October. I got the stakes from Dry Creek, back of our cabin, from a pile of driftwood there.

I see the map on this wall, marked Defendants' Exhibit "X," and the ground marked the Bon Voyage. I put the upper center stake at point 1 on this map in September or early October. I put in five

stakes in all. The upper center stake was an ordinary round driftwood stake, an inch and a quarter in diameter about. I did not write anything on it at that time. Just drove it in the ground through about three inches of frost with a pick, and put the next stake at the point 2, in a clump of willows, in the brow of the hill that was known as Gold Hill. That is the hill northeast of the claim. I put one of these driftwood stakes at the point 2, put it in the ground, in a similar manner, then I lined up this stake and that stake (referring to the center stake) with the south peak of Sledge Island, a little -nob on the southerly extremity.

I then put a stake at the point 5 on this map in line with the south peak of Sledge Island. I have since that time examined that north line with reference to the south peak of Sledge Island and it  
60 is identical. At the point 5 I put in another driftwood stake.

These stakes were in the neighborhood of about three feet long. Point 5 was the northwesterly corner of the Bon Voyage and point 2 the northeasterly corner.

After leaving the northwesterly corner I turned a right angle, a fairly good right angle, sighted for some object on the beach, and came down and put a stake at point 12 on this map, similar in size to the other stakes, planted it in the ground in the same way. From there I turned, as near as I could, a right angle to the point marked 3 and 10, and put in the southeast corner stake similar driftwood, similarly planted in the ground. There was no writing upon the stakes at that time. I had a pick and shovel and a pan and sunk a hole at the northwest corner and made a discovery of gold. I think the hole was about 4 feet deep. No one was with me at the time. I panned there and found colors of gold, indications of gold. I found gold, that was all I could say. The character of the ground was that it was a slide, in the nature of a slide. I got the prospects in a blue clay and broken rock. I was on the ground again December 25th, Christmas day, 1901. Upon returning to town there was a man by the name of Brown, Charles Brown, came to town with me. On the 25th of December, 1901, I just went out there to be able to locate and find my stakes, upon the first of January, because the ground when

I was out there was bare and now there was several feet of  
61 snow, two or three feet, and I went out to locate my stakes so that I could find them on the first of January, because the ground when I was there was bare and now there was several feet of snow. I found my stakes. After finding these stakes, I had broken into Dry Creek and went into a cabin on Dry Creek, where I found a man named Hannan. I stopped, dried my stockings, and he set up a lunch for me. Directly after leaving the cabin Brown and myself came to town together, came right across the Bon Voyage claim to town. I showed the stakes to Charlie Brown. I just stated that this was my claim; didn't go up and point each stake out to him.

I was back there at half-past eight o'clock, January 1, 1902. I left Nome on the night of December 31st; went to Little Creek and Extra Dry; came back to this claim in the morning. I then put the location notice on the initial stake. The first stake I found was at the northeast corner, in the bunch of willows at point two. I

scribed it with the letters "B. V." No. 4; then went to the initial stake, put my location notice on it, scribed that "B. V." As near as I could pace it, it is a little over 300 feet from the northeast to the initial stake. The initials "B. V." represented Bon Voyage. I put the location notice in a slit in the top of the initial stake. I marked the stake with a scribe, which is an instrument used by engineers to cut wood in marking it. I then went to point 5, 62 the northwest corner of the Bon Voyage and marked that stake, scribed it in the same manner. I scribed all the stakes in that way in a similar manner. The distance from the northeast to the northwest corner was about 660 feet, and from the northwest corner to the southwest corner was supposed to be 1320 feet. It turned out afterwards to be a little longer than that. The distance from the southwest to the southeast corner was supposed to have been 660 feet. It was about that. I filed the location notice, filed it for record.

I was next back on the claim on November 11, 1903, as near as I can remember. I was taking a man out to start in to work representing, also taking my transit out and surveying the claim and tying in the corners. I was a United States Deputy Mineral Surveyor then in 1903. I made a survey of it. Mr. Lang and Mr. Taft were with me for the purpose of assisting me. They went out upon the claim with me and went round the claim. I did the instrument work then, and they did the measuring, taping, carried the tape. We started in at the northeast corner, where a clump of willows were, point 2 on the map, Defendants' Exhibit X. I have the field-notes of that survey. I had a transit, tape and pins, steel tape, ordinary surveyor's steel tape, 100 feet long. The tape was stamped correct by the United States Government, and was the special tape for that kind of work. Started at point 2, northeast corner, put in a new stake at that point, 2x2. I found 63 a stake placed by me in 1901 at that point after considerable trouble. Found it where that No. 2 stake now stands. The markings were not decipherable at once. It seems to me the stake was marked Max Roth, by Otto Halla, July 10th, or something like that, 1902. The stake which Otto Halla used was the original stake which I had placed there, the northeast corner stake. It had been whittled off nearly, but there was enough left so that I could decipher the "B. V." From point 2 at the northeast corner I took bearings on Sledge Island. The compass on the transit was broken and I took the angle with the vernier. My field-notes show from the northeast corner to the northwest corner, hit the south peak of Sledge Island. That is the same as I originally staked it, lined up the same. It hit the center of the peak. When I put the instrument on I hit the center of the south peak of the contour of Sledge Island. This stake, which I found at the northeast corner of the Bon Voyage, having written on it Max Roth, and having exposed thereon a part of the scribing "B. V." I took up because I considered it my property and brought it back to Nome and put it in Dr. Westby's Building, down on Front street. It remained there until it was burned up in the fire. The purpose for which I took



this stake was in case of trouble arising over this claim I could have that to defend it. You could make out the scribing underneath the writing, if you knew the "B. V." was there. You  
64 could see part of the cutting, the number had been erased, originally marking the corner "No. 4 B. V." The "No. 4" you could not make out, but you could make out part of the "B. V." All the stakes planted by me when I surveyed the claim was 2 by 2's, each designating the point "N. E. B. V."; "N. W. B. V."; "S. E. B. V."; "S. W. B. V." At the northeast corner I placed a stake 2 by 2 inches with a nail driven in the top to designate the point, and it was scribed "N. E. B. V." and driven in the ground. The bottom of that stake is there yet. It has been burned by a tundra fire. We found the bottom of it in 1906 and mailed a new stake to it. That stake remained there from the 11th of November, 1903, until the same was burned by tundra fire. In 1903, when surveying, I didn't take in the initial stake at all. I took up the four stakes there, the corners, by making the survey and tying each corner in regardless of the initial stake. I ran a line from the points 10 to 2 that day. I made the angles of the claim 90 deg. From the northeast to the northwest corner is 660 feet. I had to pull in the northwest corner. It was about 20 feet out. I pulled it in so as to make it exactly 660 feet. I then turned a right angle and ran down to the southwest corner. I measured down 1320 feet and put up a stake at the point 4 instead of the point 12. I found the claim was going to be over 20 acres. I was cutting down the excess. I then turned a right angle and ran to the southeast corner. We  
65 may have moved that a foot more or less; that line was about right. We made the distance 660 feet. We ran it back, checked back to the northeast corner. I made the original field-notes November 11th, 1903, on the ground.

On cross-examination, the witness testified as follows:

I first put the original stakes on the Bon Voyage September, 1901. I intended to locate it January 1, 1902. I didn't locate it in September because the ground was not open. I had reason to believe there were conflicting locations. I had never been over the ground before the latter part of September or first of October. I had examined the Recorder's office to find if anything conflicted out there, and was looking for a particular claim. I found one stake of it, but don't remember now what the name of it was. I was looking for a claim staked and recorded by D. W. Waldron, and I found the one stake about at the point marked two on Defendants' Exhibit "X." As near as I can remember, it was a claim known by the name of the Gold Hill Claim. I did not tie to the Waldron stake, because I did not consider it a permanent tie. The Bon Voyage claim was not tied to anything outside of 1500 feet in a certain direction from Newton Gulch at that time, and afterwards, when I surveyed it in November, 1903, I tied the claim to permanent objects. The Waldron stake I found was just a willow out from the bunch there  
in the clump. The clump of willows have been removed.

66 Upon further redirect examination, the witness testified as follows:

A paper being handed to the witness he identified it as a copy of the Location Notice posted on the Bon Voyage claim on the 1st day of January, 1902; and thereupon the copy being a certified copy of said location notice, recorded in Vol. 99, page 296, Records of said District of Alaska, was admitted and read in evidence, without objection as follows:

DEFENDANT'S EXHIBIT 5.

#13772.

*Location Notice.*

Notice is hereby given, that the undersigned, in compliance with the requirements of Revised Statutes of the United States, and the local customs laws and regulations has staked 20 acres of ground by right of location and discovery, for placer mining purposes, situate in the Cape Nome Recording District, District of Alaska, and more particularly described as follows to wit—Commencing at this initial stake which is situated about 1500 feet in a Southerly direction from the upper end line of Creek Claim No. 3 Below on Newton Gulch a tributary to Dry Creek and Snake River in the above-mentioned District, and being in the center of the North end line of said claim; thence 330 ft. in a westerly direction and parallel to to said Newton Gulch to corner stake No. 1; thence 1300 ft. in a Southerly direction and at right angles to corner stake No. 2; thence 660 ft. in an Easterly direction to corner stake No. 3; thence 67 1320 ft. in a Northerly direction to corner stake No. 4; thence 330 ft. to the initial stake or the place of beginning. This claim is more particularly situated as follows, to wit, being on the divide known as "Gold Hill," which is between Newton Gulch and Nome River and is next to one certain Bench claim known as the Gold Hill claim No. 1 staked and recorded by Thos. Wheeler.

This claim shall be known as "The Bon Voyage."

Located this 1st day of Jan., A. D. 1902, at 8:30 A. M.

J. POTTER WHITTREN.

Witness:

JAS. W. BAYNE.

Filed for record 9:26 A. M. 2d Jan. 1902, at request of J. Potter Whittren.

(Vol. 99, page 296.)

T. M. REED, *Recorder.*

E. WHITTARD, *Deputy.*

UNITED STATES OF AMERICA,

*District of Alaska, Precinct of Cape Nome, ss:*

I, F. E. Fuller, United States Commissioner and Ex-Offic-e Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above

**EXHIBITS  
NOT  
SUITABLE  
FOR  
MICRO -  
FILMING**



and foregoing is a true, full and complete copy of Instrument numbered 13772, the same being Location Notice of "The Bon Voyage" Claim, as the same appears of record in Volume 68 99, at page 296 thereof, of the records of my office.

Witness my hand and the seal of the said office this 2d day of May, 1907.

[SEAL.]

F. E. FULLER, *Recorder.*  
By F. R. COWDEN, *Deputy.*

[Endorsed:] "Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, May 6, 1907. Jno. H. Dunn, Clerk. By ———, Deputy."

The witness' book of field-notes was thereupon produced, and he testified further as follows:

That is the original book of field-notes, and this paper (referring to a map) is the original plant of the Bon Voyage as surveyed November 11, 1903. There has since been added to that the plat of the Billie Fraction staked in 1905. The lines are correct. The Bon Voyage is correctly represented there on this map, according to its location on the ground, with the exception of the bearings as they are there on the plat, I could not get the correct bearings on it on account of the break in my instrument, because the needle of my compass being broken I could not make the bearings, but the angles are correct and I know that the distances given here are correct. My transit had fallen down the hill at York and the needle point of the compass, the jewel in the compass had been broken, the needle had been broken, and it would not work on account of the breaking of the jewel, so, I say, the bearing may not be exactly correct but the distances and the angles are correct. That transit is still broken and is here in town.

(Here follow maps marked pp. 70 & 71.)

72 Mr. BRUNER: We object to the introduction of the field-notes in evidence on the ground that it is incompetent, irrelevant and immaterial, being merely a personal memoranda of the witness from which he can refresh his recollection, but he cannot offer it as an exhibit, because of its self-serving character.

Which objection was overruled by the Court and exception duly noted, marked Defendants' Exhibit "E," and read to the jury as follows:

On cross-examination the witness testified as follows: In reading my notes to the jury I read the word- "representing shaft" instead of "prospecting shaft." I consider them equal and the same thing. I do not know why I made a mistake and called it the "representing shaft."

The first time I was ever on this claim was the latter part of September, or early part of October, 1901, I was again there on the 25th of December. When I first went out I took stakes from Dry Creek, five stakes, and took a shovel and a pan with me. I sunk a hole to the northwest corner, which was about two or three feet across, I guess. Just after I got through the tundra sod the hole was in the neighborhood of 3 or 4 feet deep, big enough for me to get the shovel in, to work with the shovel. The hole was about a foot in diameter, just about the size of a post hole. The ground was not frozen, except the top, possibly three inches of frost. I made a discovery, found colors. That hole would be about here (indicating.)

73 The witness thereupon marks a point on Exhibit "X" with the figures 22. I have not been out there since to discover if that hole is still there. The parties who did the representing for the year 1903 must have taken advantage of that hole because I ran my stake up on this line at that time, the stake where I set to indicate where they were to dig the representing shaft and they ran right up to my stake, they run their cut right over to my stake and that cut is still there. This hole in which I made my discovery at point 22 was inside the claim as originally staked, but after I moved the northwest corner in in 1903 when survey was made, it was just a few feet outside the claim as drawn in, about 20 feet outside of the lines of the claim as established in 1903, and they used that hole as a part of the assessment work for that year. The hole is not all obliterated. I had chosen a very prominent place. That northwest corner prior to November 11, 1903, was just about where I have indicated, where I dug my hole. The hole was right about at the northwest corner. I think it was to the left on my northwest corner, in a southerly direction. Assuming that this point was the corner where the original stake was prior to my drawing in the corner there, some 20 feet, that hole would be about in this corner, right in the crotch of the corner. I have no notes showing the exact number of feet I drew in the corner. The claim was too large, and I left the old northwest corner stake at its original place and drove a new stake where it now is. The old stake that was there is

74 the same stake that I put in September or October, 1901, and it remained in the same position all of that time and was still there on November 11, 1903. The claim was too large. I don't

think we drew in our stakes. We just put in new stakes. I did not take any notice of how much I drew in of my corner stakes at that time, but as I remember I drew in the northwest corner stake in the neighborhood of 20 feet. My original northwest corner was approximately in a direct line with my northern boundary line. I was out there marking and surveying. I knew there was some excess.

From the 1st of January, 1902, until November 11, 1903, I was never upon that land, and nobody during that time ever did anything in my behalf. I next visited the ground Nov. 11, 1903, after the first of January, 1902. When I was there in November 11, 1903, I found all the original stakes, in the same place in which I originally placed them, all marked with the name of the claim and scribed "B. V." They were marked "B. V." with the number. The same stake was also standing at the initial point.

At this point the witness was asked the following questions and made the following answers:

Q. How did you arrive on that day in November, how did you arrive at the course, South seventy degrees west?

A. I took a glass off my compass and I inserted in one end of the glass—stood the needle on the pivot, the needle as the jewel of the needle was broken and Mr. Suter had told me—

75 Q. Well, it don't make any difference what Mr. Suter said—

A. —and placed the needle on that pivot and allowed it — swing around—I allowed it to do that three times and then I took it out, or took it up and it stopped at the south—three times I allowed it to do that and I think I made a note in my note-book where it stopped so then I took that merely to give me the directions and in that way I got my directions for the plat.

Q. Was that magnetic or true north?

A. Well, that would have been magnetic if the needle had stopped at the true line.

Q. Well, you know whether it did or not?

A. No, I do not.

Q. So that south seventy degrees magnetic took you over to Sledge Island?

A. Well, as I say, that was what I was depending on for my bearings. I am depending on this line produced would strike the south peak of Sledge Island exactly.

Q. Do you mean to tell me now that you are claiming—that you are claiming that this map is correct in any degree?

A. I am going to claim that the map, what I have as to the distances there is some degree is quite correct.

Q. Well, now, answer me the questions. Would seventy degrees, south seventy degrees west magnetic, take you to the south peak of Sledge Island?

76 A. Well, starting at this point (indicating) if that was south forty degrees and forty minutes west, allowing for the same variation to be the same as I was getting it on the sand spit, which would be twenty-one degrees and twenty minutes east that line would be about in that same position.

Q. Well, don't you know that that would take you right to the center of Sledge Island instead of to the south peak?

A. Well, possibly the magnetic point of my needle as I say would not stop at any particular place, being broken I could not depend upon it.

Q. Well, you have testified now at least a dozen times to the needle of your compass being broken but I wish you would answer the question?

A. What is your question?

Q. Don't you know that that would take you right straight to the center of Sledge Island instead of to the south peak?

A. No, I do not, I did not tie to the courses I tied to angles.

Q. How did you arrive at your angle then?

A. Which angle?

Q. That angle of south seventy degrees west? Why have you put it down in that course, why have you put it down south seventy degrees west?

A. Merely for completing the map, you have got to—if you cannot get your bearing you have got to find if you cannot take your true meridian—if you cannot get one meridian you have got to take another to complete your courses and your angles.

77 Q. Then you do not say that this map is correct?

A. I claim that the distances and angles are correct, I never have made any claim that the courses are correct on that map, no, sir. The testimony I have just given all have reference to my survey of the claim on November 11, 1903.

The witness then continued to testify: I staked the Billie Fraction during the summer of 1905. That was not the time I made my computation of the courses and distances. I did not put any courses or distances on this plat of the Billie Fraction. There is none given. There are two sets of field-notes on that page, one pertaining to the Billie Fraction made in 1905, and the other pertaining to the Bon Voyage, which I made in November, 1903. I made all of those notes on that page pertaining to the "Bon Voyage" on November 11, 1903. The reason why I happened to make those notes of the Billie Fraction on the same page was this: We was going out to the claim and I picked up this book of field-notes and took it with me so as to go over all our corners and to see that they were all properly marked, and Andy and I were going to visit the claim and I just merely slipped this note-book in my pocket and took the transit along, and Andy said that nobody seemed to stake this ground from which the Billie was staked and which we had located or I had located the Bon Voyage originally and where we had drawn in our lines to make it exactly twenty acres, some twenty feet or so, and it just

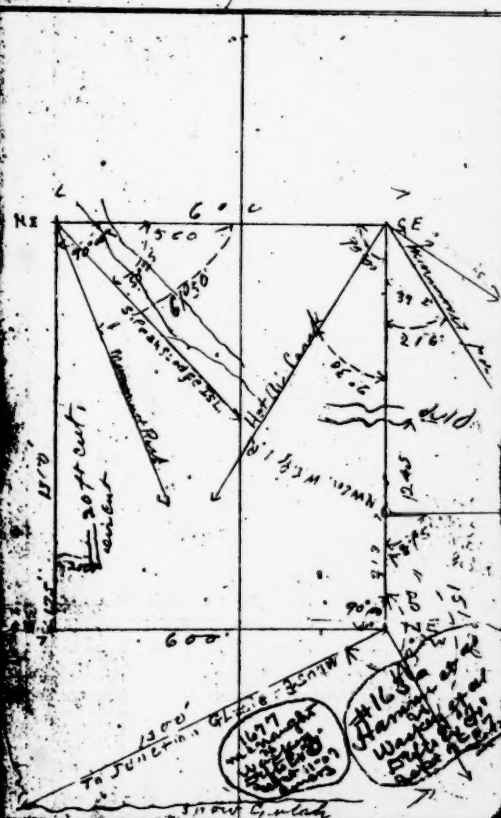
78 seemed to be standing there vacant, and I said yes, and we staked this fraction in here and I just took my same field-notes where I had made them when I made the survey in 1903 of the Bon Voyage and I just put my notes of the Billie Fraction on this same page that I had used to take this map off.

The notes of 1903 were made first. The reason why the first note on this page is where I tied to the Billie Fraction is because all sur-



**Defendants' Exhibit "F."**

Oct 30<sup>th</sup> 1909 2<sup>nd</sup> Bureau Geo  
N. W. Com. Co. Oct 22  
Republic Quartz Claim



**Defendants' Exhibit "G."**

no. 84.  
Mackin  
Stamper

Nov 13<sup>th</sup> 1903  
5 1/2 Pitt Street B.  
To new position

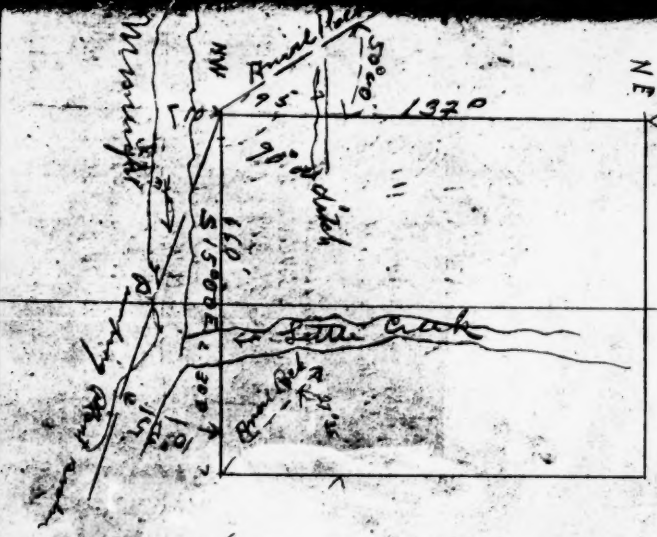
(Cold and windy)

Dr. Linn

None exists PP

Note, all corners cut marked with  
 8" x 8" stakes with nails to secure  
 the joints. Corner, N.E.  $8.5\frac{1}{2}$  -  
 N.W.  $8.5\frac{1}{2}$  - S.E.  $1.5\frac{1}{2}$  x S.W.  $8.5\frac{1}{2}$   
 Rebarcutting work being a ditch  
 75 ft. from N.W. corner for the year  
 1903.

N E T <sub>1</sub> , S E C <sub>1</sub>	6.60
N E C <sub>1</sub> to West	200
S W C <sub>1</sub> to South Canyon	1720
S W to S E C <sub>1</sub>	200
S W C <sub>1</sub> to bedded	
S W C <sub>1</sub> + Aveue Rock	
NW C <sub>1</sub> Lower Profing Plant another style	
NW + Aveue Rock	1320
NW to N E	195
NW to ditch	
S W to NW C <sub>1</sub>	660
S W to Junction Monkeys road + Little	660
N.W.S.W.	





veyors always start at the bottom of his page and work up. This is all my handwriting. The age is not the same. Mr. Zimmer was my draughtsman in 1905 and I remember taking these notes just as they are about the Billie Fraction, just the two or three—or a couple of entries, two or three distances, and I remember computing the angles and measuring the distances and putting in this Billie Fraction right in on the same plat or map as I have the Bon Voyage lines.

At the time we made the survey there was no representing or prospect shaft there. I put in the stake, marked the place. We started the shaft that day. I tied all my corbers to that stake, the representing stake.

Upon redirect examination, the witness testified (referring to his field-book) : The page preceding the "Bon Voyage" survey were notes of a survey made by me October 20, 1903, and the one succeeding was the 20th of November, 1903, being the Republican Quartz Claim,

5½ Little, 20 acre fraction. Said pages were thereupon introduced in evidence, to which admission of evidence plaintiffs objected upon the ground that the same was irrelevant, immaterial, incompetent, hearsay, self-serving declarations of a party in interest, marked Exhibits "F" and "G," and were as follows:

(Here follow diagrams marked pp. 79 & 80.)

81 CHAS. D. TAFT, produced by the defendants, being duly sworn, testified:

My name is Charles D. Taft. I live in Nome at the present time. I came from Seattle. I was a plumber there. I came up here to testify in this case. Mr. Whittren procured me to come up. He paid my transportation. I have been in Nome prior to this last time. That was in 1903 and '4. I arrived here the 10th of July, 1903, from Seattle, and stop with Mr. F. M. Lang on the spit. He is here now. I know the "Bon Voyage" Claim. The first time I saw it was November 11, 1903. I went with Mr. Lang and Mr. Whittren to help survey the claim. We ran the lines. I carried the chain; I took the lead in carrying the chain, or it was a steel tape which we used at the time; just the same thing. Mr. Lang also went out with us on November 11th; no one else, except Lang and Whittren. We started to survey from the northeast corner.

At this point the witness was requested to examine the map, Defendants' Exhibit "X," and continuing testified:

We began the survey at this point (indicating the northeast corner), the point marked 2. From there we went down to the stake marked 5, Mr. Lang and myself. From there we went to the northwest corner and found a stake at that point, a driftwood stake, shaved off and carved a B. V. on it. I don't remember whether anything else was carved on it or not. The stake is about 2 feet above the ground. We did not place a-y other stake there. If my memory serves me, we moved that stake in about twenty feet; that is, we set a new stake in about twenty feet from the old stake. The new stake was a 2 x 2. We brought it from town. It is marked to designate it the corner of the Bon Voyage, cut in. At the northeasterly corner of the Bon Voyage we found a stake, a driftwood stake, that had been shaved off. There was written on it the name of Max Roth by Otto Halla, Agent. There was a plain "B" and a portion of a "V" on the stake, partially obliterated with the knife. The "B-V." had been carved in. The stake was taken down and brought to town by Mr. Whittren; that is, he took it away from the claim on that day and I suppose he took it to town. I remained on the claim after the others left. We placed a stake at the northeast corner, and, as I remember, there was another stake there. The stake we placed was a 2 x 2, carved "N. E. B. V." From the northwest corner we went back to the point 2 northeast corner, and chained the No. 3 southeast corner. Mr. Long and Mr. Whittren were with me. We found a stake there, a "B. V." stake, about 2 feet high, 2 inches in diameter, a round stake. It had "B. V." carved into it on one side. We put up one of the 2 x 2 stakes at this point, carved "S. E. B. V." From there we went to the southwest corner. We had some difficulty in finding that stake, but found it was marked "B. V.," in the same manner as the others. We moved that stake in; that is, we set another stake. We planted that stake about 50 feet from the other stake, in from the old stake. The old stakes were left standing. After having completed the survey on the 11th of November, 1903, we finished up at the shaft, at

the stake where I sank the shaft. A stake was placed there. I know the old wagon trail, the road to Tripple, it runs about 50 feet from the shaft, quartering over the hill. Mr. Whittren placed a stake there. He ran angles from the two stakes, the northeast and the northwest corners.

After having finished the survey, I stayed on the claim and went to work. Mr. Lang and Mr. Whittren went down to the Williams boys' claims on Newton Gulch, and I commenced to work on the shaft. I placed some mounds around the corner stakes, picked it up. Had a pick and shovel. I have been on the Bon Voyage Claim since that time. Was there in 1904; was passing by there in September, just passing by the claim, and stopped there a little time. There was nobody there. I saw this shaft stake. When I did the work I left a good monument around the stake, and it was setting close to the edge of the shaft, and the dirt in the spring and summer had thawed away from the stake and the stake was about to fall in; so I moved the stake back a little and placed a new monument and set it in place. I passed the northeast corner several times, Corner No. 2. It had not been changed that I noticed. I would have noticed it if it

84 had been changed. I was doing some work in the vicinity on the Roosevelt and Fox Creek. I was working on the Roosevelt for Mrs. McNaught. That is the claim marked there (indicating on the map). I have been on the claim since then. I went out there on the 4th of August, and I went out there on the 22d of August of this year. I made an examination of the stakes, marking the corners of the claim. To the best of my knowledge, the stakes are in the same place that they were placed at the time of the survey in 1903. I do not think they could have been moved any appreciable distance. I have no interest in the lawsuit, none whatever.

On cross-examination the witness testified as follows:

I got free transportation here from Seattle to testify in this case and was to have \$5.00 a day and expenses while I was in Nome. That's as far as my interest goes.

Since I have been here I have been living with Mr. Lang, down on Front Street.

I have been doing no work on the Bon Voyage this year. I arrived on the 11th of June. Since I came here I have been up north with Mr. Lange; was there 23 days with Mr. Lange on his property in the Kougarok, 23 days representing his claims.

At the time we made the survey there was no hole at the point marked as representing shaft. I dug the hole afterwards.

85 F. M. LANGE, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I live on Front Street in Nome. I know C. D. Taft. Have known him since 1902. In 1903 he was living with me in Nome on the Sand Spit. He was working for me.

I know where the "Bon Voyage" Claim is. I first saw it in the first part of November, 1903. We went to survey it on that day.

Mr. Whittren, Taft and myself surveyed the claim. I helped measure the claim; helped chain it. Carried the stakes and tools. The stakes were 2x2. They had markings on, cut in with a surveyor's instrument, marked "B. V.," with the corners "N. E." and "N. W." We had a pick and shovel and surveyor's instruments. We started to survey the "Bon Voyage" Claim at the northeast corner.

The testimony of the witness Lange in reference to surveying the claim was in substance the same as that of the witness Taft.

ARTHUR GIBSON, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I am acquainted with the "Bon Voyage" and "Golden Bull" Mining Claims, also the "Golden Calf" and "Roosevelt." I surveyed them March 12, 13, and 14, 1907. I made this plat, Defendants' Exhibit "X," on the wall. This plat is a correct  
86 plat of the claims as I found them on the ground at that time.

I found that there was a trifle over 20 acres in the "Bon Voyage" Claim, forty-eight one-thousandths. I set now stakes, properly marked, three feet and twenty-one inches northerly from the southeast and southwest corner stakes, in order to reduce the claim to exactly 20 acres. I did this at the direction of Mr. Orton, Attorney for the defendants.

It was admitted that the witness Arthur Gibson was a qualified surveyor and engineer.

Dr. J. J. CHAMBERS, a witness produced on behalf of the defendants, being first duly sworn, testified in substance that he was on the said "Bon Voyage" Claim about the 25th of August, 1902; saw the initial stake with the location notice in it, and the northwest corner stake. Did not see any other stakes at that time; that he took the notice out and read it; that he had been on the claim recently, within the last six months; had been living there practically ever since the 5th day of December; that he knew where the upper stakes of the "Bon Voyage" Claim are at the present time and they look to be in just the same place as he saw them in August, 1902.

J. POTTER WHITTREN, recalled on behalf of the defendants, testified further as follows:

I made a discovery of gold upon the "Bon Voyage" Claim in the year 1903; that was within the boundaries of the "Bon Voyage" as they now stand; this was December, 1903.

87 Being further cross-examined, the witness testified as follows:

It was about the middle of December the discovery was made, 354 feet from the northwest corner; it was at the representing shaft for 1903. The occasion of my being out there was to pass upon the work I was to pay for. I took the dirt off the surface of the ground where it had been thrown out of the shaft. I had made a discovery prior to that time. I went out there on that day partially to make a discovery. I was not there while the work was being done. I borrowed a sack on that day from Phil Williams and put the dirt in that and brought it to town and thawed it out. Phil Williams



was representing some ground for George James on Newton Gulch. In December, 1903, I was a Deputy Mineral Surveyor. The date of my appointment is February, 1903. I was not a Deputy Mineral Surveyor on December 22d, 1902.

ANDREW EADIE, a witness on behalf of the defendants, being first duly sworn, testifies as follows:

I am one of the defendants. I have been in Nome since 1900, engaged in mining. I know where the "Bon Voyage" Claim is. I first saw it in October, 1904. I was on the ground at that time, early in October. I made an examination of the markings on the ground at that time. The first time I went out to the "Bon Voyage"

88 I came up Dry Creek on the old wagon road running through this way (indicating on Defendants' Exhibit "X").

About 50 feet west of the wagon road there was a stake there. That was the first stake I saw of the "Bon Voyage." There was some writing on it. It was the representing stake. I next saw the northeast corner at point 2 on Defendants' Exhibit "X." It was a 2x2, with a tack on top of it. It had the letters carved "B. V." on it and northeast corner cut in with a knife. The stake was planted in the ground and a small mound around it. There were several stakes at that corner. I also saw a stake at the point 5 on Defendants' Exhibit "X," 2x2, similar to the first one, with the letters "N. W. B. V." carved in it. I saw also the stake at the northeast corner. It was in a small mound. I also saw the southwest corner. It was marked "S. W. B. V.," cut in with a knife, planted in the ground similar to the others. I also saw the southeast corner at the point 3 on Defendants' Exhibit "X," the same kind of a stake, marked "S. E. B. V.," carved in. The stake was planted in a small mound.

I am a half owner in the "Bon Voyage." At this point a deed was admitted in evidence, marked Defendants' Exhibit "H," and is in words and figures as follows:

#### DEFENDANTS' EXHIBIT "H."

Know all men by these presents: That J. Potter Whittren, of Nome, Alaska, the party of the first part, for and in consideration of the sum of one-dollar, and other valuable considerations, 89 lawful money of the United States, to him in hand paid, by Andrew Eadie, the party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns an undivided one-half ( $\frac{1}{2}$ ) interest in the following described placer mining ground, situate in Cape Nome Recording District, District of Alaska, and more particularly described as follows, to wit:

One certain Bench Claim known as the "Bon Voyage" situated about 1,500 feet in a southerly direction from No. 3 Creek Claim on Newton Gulch, staked and recorded in 1902, surveyed and



survey stakes with name and corners carved on same, placed in tundra mounds in the fall of 1903.

Said bench containing twenty acres of placer mining ground.

To have and to hold the same to the said party of the second part, his executors, administrators, and assigns, forever. And I do for his heirs, executors, administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

90 In witness whereof I have hereunto set my hand and seal the 24th day of Sept., A. D. 1905.

J. POTTER WHITTREN.

Witness:-

L. A. FEIKE.

J. W. ALBRIGHT.

UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

This is to certify that on this 24th day of Sept., A. D. 1905, before me, J. W. Albright, a Notary Public in and for the District of Alaska, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[SEAL.]

J. W. ALBRIGHT,  
*Notary Public.*

[Endorsed:] "Filed for record at request of Andrew Eadie Oct. 9, 1905, at 05 minutes past 10 o'clock and recorded in Book 154, page 302, Records Cape Nome Recording District, Alaska. T. M. Reed, Recorder. By W. W. Sale, Deputy. 4 Folios 3 Ind. \$2.85."

[Endorsed:] "Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Alaska. Aug. 28, 1907. Jno. H. Dunn, Clerk. By ———, Deputy."

91 The witness, continuing, testified: I have been on the claim since that time, mining upon it. I am familiar with the markings on the claim as they now exist. The corner stakes are now in exactly the same place as when I first saw them. We have been working the claim last winter and last summer, Mr. Waskey and myself.

[*Stipulation Admitting that Defendant was a Lessee, etc.*]

At this point the following proceedings were had:

"Mr. FINK: It is stipulated between counsel for plaintiffs and defendants in this action, that in lieu of proof it is admitted that the defendant was a lessee under and by virtue of the terms of the leases attached to his answer; and it is admitted also that Mr. Eadie is working under a lease as set forth in the respective answers.

The COURT: Let the record so show.

Mr. COCHRAN: You will admit, I presume, that Mr. Eadie is also a lessee on a one-half interest in the mine from J. Potter Whittren.

Mr. BRUNER: If you say he is.

Mr. COCHRAN: Together with Waskey.

Mr. BRUNER: I understand that; there is no necessity of proving that.

The foregoing is all the testimony introduced at the trial of the above-entitled action.

[*Motion for a Verdict in Favor of Plaintiffs.*]

Thereupon the plaintiffs moved the Court to instruct the jury to find a verdict in favor of the plaintiffs for the following reasons:

92 "First. That the testimony as now adduced before the Court and to the jury shows that on the 1st day of January, 1904, the lands included within the Golden Bull location was open and unappropriated public domain of the United States and subject to location;

Second. Because the defendants have not established any defense to the plaintiffs' complaint or have not answered in any way the testimony submitted by the plaintiff- in the case.

(Jury withdrawn by order of the Court.)

Mr. REED (continuing:) The testimony submitted by the defendants shows that the discovery made by Mr. J. Potter Whittren in the year 1901 as marked upon the map by the witness himself was at the point #22; that on November 11th, 1903, the time when he made the survey of the claim and drew in the lines of the Bon Voyage claim it left the point where a discovery was made outside and not within the lines of the said Bon Voyage claim, and the defendants themselves, recognizing that it was necessary that a discovery of gold be made within the lines of the location as amended, put Mr. Whittren back on the witness-stand, just before they closed their case on Saturday evening, and he testified that on December 11th, 1903, he again went to the mining claim in question and made a discovery at the point designated as the prospect shaft and within the lines of the said Bon Voyage claim.

93 "The testimony also shows that at the time of said discovery of gold Mr. J. Potter Whittren was a Deputy Mineral Surveyor of the United States, and therefore under the laws of the United States incapacitated to make a mining location."

[*Decision on Motion for a Verdict for Plaintiff-, etc.*]

Said motion having been argued and submitted, the Court announced his decision as follows:

"The COURT: I have given as much time and attention to this question as I could well within the time I had at my disposal; it is an important question and in some respects I regret I could not have given it more time. We take the declarations and decisions of the department of the interior as entirely binding on this Court, and in constituting the law as they have, that a Deputy Mineral Surveyor is within the prohibition of this Statute, and have relaxed the rule of strict construction, and brought themselves within the exception to the rule. In other words, they construe it with reference to the manifest intent of the legislators, and we apply the same rule to it, and following the Department of the Interior, we see no reason why this should not be the law, because the deputy mineral surveyor-, as has been declared in numerous decisions, are subject to the directions of the Commissioner of the Land Office; they are therefore officers in the General Land Office, or come properly within the designation, officers and employees in the general land office; that doesn't mean, I think, in the general land office at Washington; it means all the various officers under the control of the Commissioner of the land office.

94 So it being the law, as I understand it, that a deputy mineral surveyor is within this prohibition, and may not locate land. That he is in fact a purchaser of land when he locates land, and I think a purchaser of land is one who acquires land in any other manner than by descent. All lawyers, I think, will agree that that is the proper definition and classification. I see, of course, that there is a penalty attached by Section, and that is removal from office, but I don't think that the fact that there is a penalty—that that special penalty is affixed to the office—should trouble us when we come to construe the Statute—construe the general prohibitory clauses of this section. So in view of these various considerations and in view of the fact that Mr. Lindley has so decided that a purchaser such as we have described, we have authority for that \* \* \* But here is prohibitory section of the statute, which further than that, as we view it, makes the location—as I have construed it—the purchase of public lands by a United States deputy mineral surveyor absolutely void. I am constrained to grant the motion to direct a verdict in this case. The motion is now granted.

Mr. ORTON: Please note an exception to the ruling of the Court on behalf of all the defendants.

The COURT: I therefore shall direct a verdict in favor of the plaintiffs in this case.

95 Mr. BRUNER: We have prepared a form of verdict for the final issue of the case, and we disclaimed any other damages than nominal damages in the opening of the case, the law requiring nominal damages, and ask the Court to instruct the jury on that point."

To which ruling each of the defendants then and there excepted.

[*Instructions of the Court to Jury.*]

Thereupon the Court read his instructions, in writing, to the jury, in words and figures as follows:

"GENTLEMEN OF THE JURY: The plaintiffs, at the close of the evidence, offered by the defendants in this case, have made a motion addressed to the Court whereby the Court is asked to direct a verdict to be rendered by the jury in favor of the plaintiffs, upon two grounds, namely:

First. That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since such survey.

Second. That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the title of both do, upon the location of December 13th, 1903, is invalid.

96 This motion was argued by the counsel on both sides of the case and the Court has given careful consideration to the arguments advanced and authorities cited, and is now of the opinion that the motion should be granted, both grounds being sound and valid in the Court's opinion.

So far as the lessees Waskey and Eadie are concerned, their rights as lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees.

The plaintiffs have offered no proof of damages incurred by them by the wrongful withholding of the possession of the claim in controversy from the plaintiffs, and have waived the right to recover any damages above mere nominal damages. Mere nominal damages, I instruct you, is some small amount of money, as for example, one cent, or any other sum not exceeding one dollar.

I submit a form of verdict with amount of damages left blank. You will determine upon the amount and have your foreman insert the amount in the blank space left in the verdict for the insertion of the proper amount or sum.

In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages.

You need not retire from your seats to make up your verdict.

## 97 [Exceptions to the Instructions of the Court to Jury.]

Thereupon, before the Jury retired to deliberate upon their verdict, the defendants and each of them separately took the following exceptions to the foregoing instructions of the Court:

"First Exception. The said defendants except to that part of the Court's instructions to the jury which reads as follows: 'That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since *since* survey.'

Second Exception. The said defendants except to that part of the Court's instructions to the jury, which reads as follows: 'That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at *the* of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the titles of both do, upon the location of December 13th, 1903, is invalid.'

Third Exception. The said defendants except to that part of the Court's instructions to the jury, which reads as follows: 'So far as the lessees Waskey and Eadie are concerned, their rights, as  
98 lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees.'

Fourth Exception. The said defendants except to that part of the Court's instructions to the jury which reads as follows: 'In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages.'

Fifth Exception. The said defendants except to that part of the instructions of the Court to the jury wherein the Court directed the jury to render a verdict for plaintiffs for the land in controversy."

Thereupon, the jury under the instructions of the Court, returned a verdict in favor of the plaintiffs as directed.

[Prayer for Settlement, etc., of Bill of Exceptions.]

And, to make the foregoing matters of record, the said defendants present this Bill of Exceptions and pray that the same may be settled and allowed.

ALBERT FINK,  
IRA D. ORTON,  
O. D. COCHRAN,  
*Attorneys for Defendants.*

[*Order Settling, etc., Bill of Exceptions.*]

The foregoing bill of exceptions having been served, filed and presented for settlement within the time provided by law, and extensions thereof made by orders duly entered of record, and the settlement thereof having been regularly continued to the present  
99 term of court and to this day, and said bill being now found correct, the same is hereby settled and allowed.

Done at Nome, Alaska, in open court this 20th day of January, 1908.

ALFRED S. MOORE,  
*Judge District Court, District of Alaska,*  
*Second Division.*

O. K.

J. ALLISON BRUNER,  
*Of Plffs' Att'ys.*

[Endorsed:] # 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff-, vs. Frank H. Waskey et al., Defendant-. Defendants' Proposed Bill of Exceptions. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Dec. 16, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants. McB. Re-filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 20, 1908. Jni. H. Dunn, Clerk. By ———, Deputy.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,  
vs.  
FRANK H. WASKEY et al., Defendants.

100

*Assignment of Errors.*

Come now the defendants in the above-entitled action and assign the following errors committed by the Court on the trial of the above-entitled action, upon which they intend to and do rely upon the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

The Court erred in permitting the witness Halla to testify in answer to the question propounded by counsel for plaintiffs that he had told B. Schwartz that he (Halla) had made a discovery of gold on the premises in dispute in the year 1902. The question, objection, ruling of the Court and answer of the witness is as follows:

"Q. You was asked with regard to this talk that you had with Mr. Schwartz going out there, in regard to that, the conversation in re-

gard to that, was there anything said with regard to the discovery of gold made upon the claim?

Mr. ORTON: Objected to as leading, hearsay, immaterial and incompetent.

Q. As to whether there had been any communication of the fact by Halla to Schwartz that he had made a discovery of gold?

Mr. ORTON: Objected to as immaterial, irrelevant, *immaterial*, hearsay and leading.

The COURT: Overruled.

Mr. ORTON: Exception taken by the defendants.

A. I told Schwartz that I had made a discovery of gold in 1902."

101

## II.

The Court erred in granting the motion of the plaintiffs to direct a verdict in favor of the plaintiffs.

## III.

The Court erred in holding that the location of the "Bon Voyage" Claim in January, 1902, was invalid, because no discovery of gold had been proven to have been made within the limits of the claim as surveyed on November 11, 1903.

## IV.

The Court erred in holding that because of the fact that Mr. Whittren, the locator of the "Bon Voyage" Claim, was a United States Deputy Mineral Surveyor in November, 1903, he could not thereafter make a valid discovery of gold on the "Bon Voyage," which had been located by him in January, 1902.

## V.

The Court erred in holding that a valid location of a placer claim cannot be made by a Deputy Mineral Surveyor, and in instructing the jury to find a verdict in favor of the plaintiffs for that reason.

## VI.

The Court erred in instructing the jury as follows: "That the proofs showing that the locator of the 'Bon Voyage' mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the titles of both do, upon the location of December 13th, 1903, is invalid."

102

## VII.

The Court erred in instructing the jury as follows: "So far as the lessees Waskey and Eadie are concerned, their rights, as lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees."

## VIII.

The Court erred in instruction the jury as follows: "In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages."

## IX.

The Court erred in instructing the jury to render a verdict for plaintiffs for the land in controversy.

Wherefore, defendants pray that the said judgment be reversed and that they be restored to all things they have lost thereby.

IRA D. ORTON,  
ALBERT FINK,  
O. D. COCHRAN,  
F. E. FULLER, AND  
*Attorneys for Defendants.*

[Endorsed:] # 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Assignment of Errors. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,  
vs.  
FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN  
and ANDREW EADIE, Defendants.

*Petition for Writ of Error.*

The defendants in the above-entitled action, considering themselves aggrieved by the verdict of the jury and judgment entered thereon, come now by Messrs. Ira D. Orton, Albert Fink and O. D. Cochran, their attorneys, and petition the Court to allow a Writ of Error to review said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and further pray that an order be made fixing the amount of security to be given by the defendants in error.

ALBERT FINK,  
IRA D. ORTON,  
F. E. FULLER,  
O. D. COCHRAN,  
*Attorneys for Defendants.*



104 It is hereby ordered, that the foregoing Writ of Error be granted, petitioners to give a bond in the sum of Ten Thousand Dollars, to operate as a supersedeas.

Dated, January 25, 1908.

ALFRED S. MOORE,  
*Judge District Court, District of  
Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey, et al., Defendant. Petition and Order for Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

105 In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,

vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN  
and ANDREW EADIE, Defendants.

*Bond on Writ of Error.*

Know all men by these presents: That we, Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, as principals, and T. M. Gibson and Art. Gibson, and J. Berger, as sureties, are held and firmly bound unto Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs in the above-entitled action, in the sum of ten thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 25th day of January, 1908.

Whereas, lately at a session of the above-entitled Court, in an action pending in said Court between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs, and Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, defendants, a judgment

106 was, on the 16th day of November, 1907, rendered and entered in favor of said plaintiffs and against said defendants, and said defendants having obtained from the said District Court an order allowing a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to review said judgment, and a Citation directed to said Joseph Hammer, Otto Halla and B. Schwarz is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California,

Now, therefore, the condition of the above obligation is such, that if the said Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, shall prosecute their said Writ of Error to effect and answer all damages and costs, if they shall fail to make

their plea good, then this obligation shall be void; otherwise, it shall remain in full force and effect.

By FRANK H. WASKEY, [SEAL.]  
IRA D. ORTON,

*Att'y in Fact.*

J. M. CRABTREE. [SEAL.]

T. M. GIBSON. [SEAL.]

ANDREW EADIE, [SEAL.]

By O. D. COCHRAN,  
*His Att'y in Fact.*

J. BERGER. [SEAL.]

ART. GIBSON. [SEAL.]

J. POTTER WHITTREN. [SEAL.]

107 UNITED STATES OF AMERICA,  
*District of Alaska, ss:*

Art. Gibson, T. M. Gibson and J. Berger, being first duly sworn, each for himself, deposes and says: That he is one of the sureties on the foregoing bond; that he is worth the sum of ten thousand dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

ART. GIBSON.

T. M. GIBSON.

J. BERGER.

Subscribed and sworn to before me, this 25th day of January, 1908.

[COURT SEAL.]

ANGUS McBRIDE.  
*Deputy Clerk District Court,  
Alaska, Second Division.*

The foregoing bond on Writ of Error is hereby approved this 25th day of January, 1908, in open court at Nome, Alaska.

ALFRED S. MOORE,  
*Judge District Court, District of  
Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., plaintiff-, vs. Frank H. Waskey et al., defendant-. Bond on Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By

108 ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,  
vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN  
and ANDREW EADIE, Defendants.

*Writ of Error [Lodged Copy].*

The President of the United States of America to the Honorable  
the Judge of the United States District Court for the District of  
Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of  
the judgment of a plea which is in the said District Court before you,  
between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs, and  
Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and An-  
drew Eadie, defendants, a manifest error hath happened, to the great  
damage of Frank H. Waskey, Joseph M. Crabtree, J. Potter Whitt-  
ren and Andrew Eadie, plaintiffs in error, as by their complaint  
appears,

We, being willing that error, if any hath been, should be  
109 duly corrected and full and speedy justice be done to the par-  
ties aforesaid in this behalf, do command you, if judgment  
be therein given, that then under your seal, distinctly and  
openly, you send the record and proceedings aforesaid, and all things  
concerning the same, to the Justice of the United States Circuit Court  
of Appeals for the Ninth Circuit, in the City and County of San  
Francisco, in the State of California, together with this writ, so as to  
have the same at said place in said Circuit on the 22d day of Feb-  
ruary, 1908, and that the records and proceedings aforesaid being  
inspected, the said Circuit Court of Appeals may cause further to be  
done therein to correct these errors what of right and according to  
the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the  
Supreme Court of the United States, this 25th day of January,  
1908.

Attest my hand and seal of the United States District Court for  
the District of Alaska, Second Division, at the Clerk's Office, at  
Nome, Alaska, this 25th day of January, 1908.

[SEAL.]

JNO. H. DUNN,  
*Clerk of the United States District Court  
for the District of Alaska, Second Division,*  
By ANGUS McBRIDE,  
*Deputy Clerk.*

Allowed this 25th day of January, 1908.

ALFRED S. MOORE,  
*Judge of the United States District Court  
for the District of Alaska, Second Division.*

110 The foregoing copy of writ of error lodged in my office for defendant- in error this 25th day of January, 1908.

JNO. H. DUNN,  
*Clerk District Court, District of  
 Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Jose7/8h Hammer et al., Plaintiff-, vs. Frank H. Waskey, et al., Defendant-. Lodged Copy Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court for the District of Alaska, Second Division.

No. 1636.

JOSEPH HAMMER, B. SC-WARTZ, and OTTO HALLA, Plaintiffs,  
 vs.  
 FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTEN, and AN-  
 DREW EADIE, Defendants.

*Clerk's Certificate [To Transcript of Record].*

I, John H. Dunn, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 109, both inclusive, are a true and exact transcript  
 111 of the Complaint, Summons, Demurrer of Defendants F. H. Waskey and J. M. Crabtree to Complaint, Demurrer of Defendants J. Potter Whittren and Andrew Eadie to Complaint, Minutes of Court of January 12, 1907 (demurrers overruled), Answer of Defendants J. Potter Whittren and Andrew Eadie to Complaint, Minutes of Court of February 16, 1907, (J. J. Chambers made party defendant), Answer of Defendants F. H. Waskey and J. Crabtree to Complaint, Reply to Answer of F. H. Waskey and J. Crabtree, Reply to Answer of J. Potter Whittren and Andrew Eadie, Verdict, Motion for New Trial, Minutes of Court of November 6, 1907 (Motion for New Trial overruled), Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error and Order Allowing Same, Bond on Writ of Error, and Lodged Copy Writ of Error, in the case of Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants, No. 1636 this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; also certify that said transcript contains all the pleadings in the above-entitled case; and that the Original Writ of Error and Original Citation in said case are attached to this transcript.

Cost of transcript \$33.25, paid by Ira D. Orton, of attorneys for defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of February, A. D. 1908.

[SEAL.]

JNO. H. DUNN, *Clerk.*

112 In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,

vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN  
and ANDREW EADIE, Defendants.

*Writ of Error [Original].*

The President of the United States of America to the Honorable the  
Judge of the United States District Court for the District of  
Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition  
of the judgment of a plea which is in the said District Court before  
you, between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs,  
and Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and  
Andrew Eadie, defendants, a manifest error hath happened, to the  
great damage of Frank H. Waskey, Joseph M. Crabtree, J. Potter  
Whittren and Andrew Eadie, plaintiffs in error, as by their com-  
plaint appears,—

We, being willing that error, if any hath been, should be duly cor-  
rected and full and speedy justice be done to the parties aforesaid  
in this behalf, do command you, if judgment be therein  
113 given, that then under your seal, distinctly and openly, you  
send the record and proceedings aforesaid, and all things  
concerning the same, to the Justice of the United States Circuit Court  
of Appeals for the Ninth Circuit, in the City and County of San  
Francisco, in the State of California, together with this Writ, so as  
to have the same at said place in said Circuit, on the 22 day of Feb-  
ruary, 1908, and that the records and proceedings aforesaid being  
inspected, the said Circuit Court of Appeals may cause further to be  
done therein to correct these errors what of right and according to  
the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the  
Supreme Court of the United States, this 25 day of January, 1908.

Attest my hand and seal of the United States District Court for the  
District of Alaska, Second Division, at the Clerk's Office, at Nome,  
Alaska, this 25 day of January, 1908.

[SEAL.]

JNO. H. DUNN,

*Clerk of the United States District Court for the  
District of Alaska, Second Division.*

By ANGUS McBRIDE,

*Deputy Clerk.*

Allowed this 25th day of January, 1908.

ALFRED S. MOORE,

*Judge of the United States District Court for the  
District of Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District  
 114 of Alaska, Second Division. Joseph Hammer et al., Plaintiff,  
 vs. Frank H. Waskey et al., Defendant. Writ of Error.  
 Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,  
 vs.  
 FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,  
 and ANDREW EADIE, Defendants.

*Citation [Original].*

The President of the United States of America to Joseph Hammer,  
 Otto Halla, and B. Schwarz, Greeting:

You are hereby cited and admonished to be and appear at the  
 United States Circuit Court of Appeals, for the Ninth Circuit, to be  
 holden at the city and county of San Francisco, in the State of Cali-  
 fornia, on the 22 day of February, 1908, pursuant to a Writ of  
 Error filed in the Clerk's office of the United States District Court  
 for the District of Alaska, Second Division, wherein Frank H.  
 Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie  
 are plaintiffs in error, and you are defendants in error, to show cause,  
 if any there be, why judgment in the said Writ of Error men-  
 115 tioned should not be corrected, and speedy justice should not  
 be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the  
 Supreme Court of the United States of America, this 25th day of  
 January, 1908, and of the Independence of the United States the one  
 hundred and thirty-second.

ALFRED S. MOORE,  
*Judge District Court, District of Alaska, Second Division.*

Attest:  
 [SEAL.]

JNO. H. DUNN, *Clerk,*  
 By ANGUS McBRIDE,  
*Deputy Clerk.*

Service of the foregoing citation admitted Jan. 25, 1908.

ELWOOD BRUNER,  
 J. ALLISON BRUNER,  
 T. M. REID,  
*Att'ys for Def'ts in Error.*

[Endorsed:] #1636. In the District Court for the District of  
 Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs.  
 Frank H. Waskey et al., Defendant. Citation. Ira D. Orton, At-  
 torney for Defendants.

[Endorsed:] No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, Plaintiffs in Error, vs. 116 Joseph Hammer, Otto Halla and B. Schwarz, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division. Filed May 19, 1908. F. D. Monckton, Clerk.

117 United States Circuit Court of Appeals for the Ninth Circuit.  
No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,  
vs.  
JOSEPH HAMMER et al., Defendants in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixteen (116) pages, numbered from one (1) to one hundred and sixteen (116), inclusive, to be a true copy of the printed Transcript of Record upon writ of error to the United States District Court for the District of Alaska, Second Division, in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of June, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[SEAL.]

F. D. MONCKTON, *Clerk.*

118

No. 1609.

United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

(ADDENDA.)

*Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

119 At a Stated Term, to Wit, the October Term; A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Thursday, the Twentieth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Eight.

Present:

The Honorable William B. Gilbert, Circuit Judge.

Honorable Erskine M. Ross, Circuit Judge.

Honorable William W. Morrow, Circuit Judge.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

*Order of Submission.*

Ordered, above-entitled cause argued by Mr. William H. Metson, counsel for the plaintiffs in error, Mr. P. M. Bruner, counsel for the defendants in error, and Mr. Charles E. Shepard, as amicus curiæ, and submitted to the Court for consideration and decision, with leave to Mr. Shepard to file a brief as amicus curiæ, and with leave to counsel for the plaintiffs in error to file his printed argument, etc.



120 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,  
and ANDREW EADIE, Plaintiffs in Error,  
vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in  
Error.

Upon Writ of Error to the United States District Court for the  
District of Alaska, Second Division.

*Opinion U. S. Circuit Court of Appeals.*

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, *Circuit Judge*, delivered the opinion of the Court:

The subject matter of this action is a piece of mining ground in Alaska, covered by two overlapping mining locations—that under which the defendants in error, who were plaintiffs in the Court below, claim having been made in January, 1904, under the name of “Golden Bull” claim, and that under which the plaintiffs in error, who were the defendants below, assert their rights having been made in January, 1902, under the name of “Bon Voyage” mining  
121 claim. The latter was made by the plaintiff in error, Whittren, who afterward executed a deed to Eadie of an undivided interest in it, the remaining plaintiffs in error holding under them as lessees, and, being in the actual possession of the disputed premises mining the same, the action was brought by the defendants in error to recover possession, with damages.

Upon the conclusion of all the evidence in the case, the Court below directed a verdict for the plaintiffs, upon these grounds:

“First. That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since such survey.

“Second. That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie, to the Bon Voyage, resiting, as the title of both do, upon the location of December 13th, 1903, is invalid.”

The record shows that Whittren located the Bon Voyage as a placer claim on the 1st of January, 1902, and so marked its boundaries upon the ground that they could be readily traced, having

previously discovered gold within such boundaries, and thereafter  
duly recorded the notice of his location. In respect  
122 to those matters there is no dispute. Being at that time a  
competent locator, the ground within the boundaries of his  
claim ceased to be open to location or appropriation by anyone else  
so long as Whittren complied with the law applicable to the case.

The record shows that, notwithstanding Whittren's location, the  
defendant in error Halla, in July, 1902, undertook to make, for a  
man named Roth, a location that he called the "Golden Bull,"  
embracing a part of the Bon Voyage claim, under which location  
by Halla, it is contended by counsel for the defendants in error,  
they acquired some right. We think it clear that there is nothing  
in that suggestion, for the reason that no part of the ground  
covered by the Bon Voyage claim was open to location at the time  
that Halla undertook to include it in his location of July, 1902.

Nothing further in regard to that claim of right on the part of the  
defendants in error, therefore, need be said.

At the trial Whittren testified, among other things, that on or  
about November 11, 1903, he went upon the Bon Voyage claim  
for the purpose of starting a man to do the assessment work thereon,  
and also for the purpose of making a survey of the claim, having  
with him two assistants for that purpose, who carried the tape,  
while he, Whittren, who was a surveyor, used the instrument.

It appears that this actual survey disclosed the fact that the  
boundaries marked by Whittren in January, 1902, included a little  
over twenty acres of ground, and for the purpose of reduc-  
123 ing the amount to the statutory limit of twenty acres, Whit-  
tren drew in two of the corners—his testimony being in  
part as follows:

I "started at point 2, northeast corner, put in a new stake at that  
point, 2x2. I found a stake placed by me in 1901, at that point  
after considerable trouble. Found it where that No. 2 stake now  
stands. The markings were not decipherable at once. It seems to  
me the stake was marked Max Roth, by Otto Halla, July 10th, or  
something like that, 1902. The stake which Otto Halla used was  
the original stake which I had placed there, the northeast corner  
stake. It had been whittled off nearly, but there was enough left  
so that I could decipher the 'B. V.' From point 2 at the northeast  
corner I took bearings on Sledge Island. The compass on the  
transit was broken and I took the angle with the vernier. My  
field-notes show from the northeast corner to the northwest corner,  
his the south peak of Sledge Island. That is the same as I originally  
staked it, lined up the same. It hit the center of the peak. When I  
put the instrument on I hit the center of the south peak of the  
contour of Sledge Island. This stake, which I found at the north-  
east corner of the Bon Voyage, having written on it Max Roth,  
and having exposed thereon a part of the scribing 'B. V.,' I took  
up because I considered it my property and brought it back to  
Nome and put it in Dr. Westby's Building, down on Front Street.  
It remained there until it was burned up in the fire. The purpose

for which I took this stake was in case of trouble arising over this claim I could have that to defend it. You could make out the scribing underneath the writing, if you knew the 'B. V.' was there. You could see part of the cutting, the number had been erased, originally marking that corner 'No. 4 B. V.' The 'No. 4' you could not make out, but you could make out part of the 'B. V.' All the stakes planted by me when I surveyed the claim was 2 by 2's, each designating the point 'N. E. B. V. 8'; 'N. W. B. V.'; 'S. E. B. V.'; 'S. W. B. V.' At the northeast corner I placed a stake 2 by 2 inches with a nail driven in the top to designate the point, and it was scribed 'N. E. B. V.' and driven in the ground. The bottom of that stake is there yet. It has been burned by a tundra fire. We found the bottom of it in 1906, and nailed a new stake to it. That stake remained there from the 11th of November, 1903, until the same was burned by tundra fire. In 1903, when surveying, I didn't take in the initial stake at all. I took up the four stakes there, the corners, by making the survey and tizing, each corner in regardless of the initial stake. I ran a line from the points 10 to 2 that day. I made the angles of the claim 90 deg. From the northeast to the northwest corner is 660 feet. I had to pull in the northwest corner. It was about 20 feet out. I pulled it in so as to make it exactly 660 feet. I then turned a right angle and ran down to the southwest corner. I measured down 1320 feet and put up a stake at the point 4 instead of the point 12. I found the claim was going to be over 20 acres. I was cutting down the excess. I then turned a right angle and ran to the southeast corner. We may have moved that a foot more or less; that line was about right. We made the distance 660 feet. We ran it back, checked back to the northeast corner. I made the original field-notes November 11th, 1903, on the ground."

By this drawing in of one of the lines of the claim Whittren left out of its boundaries the hole in which he had made the original discovery.

His testimony in respect to the survey was corroborated by that of his two assistants—Taft and Lange—Taft also testifying that after finishing the survey he stayed on the claim and went to work placing mounds around the corner stakes and working on the shaft.

Whittren also testified, among other things, as follows:

"I made a discovery of gold upon the Bon Voyage claim in the year 1903; that was within the boundaries of the Bon Voyage as they now stand; this was in December, 1903; it was about the middle of December; the discovery was made 354 feet from the northwest corner; it was at the representing shaft of 1903. The occasion of my being out there was to pass upon the work I was to pay for. I took the dirt off the surface of the ground where it had been thrown out of the shaft. I had made a discovery prior to that time. I went out there on that day partially to make a discovery. I was not there while the work was being done. I borrowed a sack from Phil Williams and put the dirt in that and brought it to town and thawed it out."

126 At the time Whittren made the discovery in December, 1903, and at the time he made the survey in the preceding month of November, he was a deputy mineral surveyor, but he was not such at the time of his original discovery, nor at the time of his original location of the Bon Voyage in January, 1902—his appointment as such deputy being made in February, 1903. The first question in the case, therefore, is whether the leaving out of his original discovery hole or shaft when he drew in the line so as to reduce the area to the statutory limit of twenty acres, invalidated the entire claim.

It is not contended that Whittren, in making his location in January, 1902, purposely, included more than twenty acres. His act in drawing in one of his lines when his actual survey disclosed the fact that there was a slight excess within his boundaries, certainly tends to show a bona fide desire on his part to conform to the statutory requirement in that regard. That a location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess, but that the excessive area only is void, is well settled. *Zimmerman et al. v. Funchion et al.*, 161 Fed. 859, and cases there cited. And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law. *Price v. McIntosh*, 121 Fed. 716, where we said:

“We are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in pos-  
127 session, under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working and which was a valuable portion thereof, and oust them from possession by making a location thereof. The defendants in error were given no notice that the width of their claim was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim, one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim.”

Does the fact that, when Whittren drew in his line so as to exclude the excess, he left out of the boundaries the hole in which he made his discovery, vitiate the entire claim?

It has been many times decided that in the absence of any intervening right, it is unimportant whether the discovery of mineral in the ground claimed is made before or after the marking of its boundaries. In such a case, the performance of those two acts (where the recording of the notice of location is not required) perfects the location; but both of them are essential to the validity of a mining location under the United States statutes. As said  
128 by the Supreme Court in *Gwillim v. Donnellan*, 115 U. S. 45, 50: The discovery “must lie within the limits of the

location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it."

When, therefore, Whittren in November, 1903, left out of his boundaries the only place upon which he had then made a discovery of mineral, he abandoned one of the essential elements of his location. It is true that the evidence tended to show that he still maintained his claim to the ground included within his readjusted boundaries, which were marked as required by the statute and embraced only the statutory area, but within those boundaries he had not then made a discovery of mineral.

Passing, for the moment, the question of his then disqualification because of his then official position, the discovery of mineral within his readjusted boundaries, prior to the acquiring of any right in the premises by anyone else, would have perfected his right to the ground. Such is the purport of the decisions in the cases of *Tonopah and Salt Lake Mining Company v. Tonopah Mining Company*, 125 Fed. 408; *Silver City Gold and Silver Mining Company v. Lowry et al.*, 57 Pac. Rep. 11, and the numerous cases there referred to. As, therefore, the location upon which the right of the defendants in error rests was not made until January, 1904, it results that if Whittren was a competent locator at the time he testified that he made a discovery of gold within his readjusted lines in December, 1903, the judgment below should be reversed.

129 Was he then disqualified by reason of his official position, is therefore the turning point in the case.

Section 452 of the Revised Statutes is as follows:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and any person who violates this section shall forthwith be removed from his office."

The later rulings of the Land Department are to the effect that this statute is applicable to a Deputy Surveyor, and therefore that such an officer is prohibited from acquiring or becoming interested in the purchase of any of the public lands. *Muller v. Coleman*, 18 L. D. 394; *In re Neill*, 24 Id. 393; *Floyd v. Montgomery*, 26 Id. 122. See, also, *In re McMicken*, 10 L. D. 97, 11 Id. 96.

In the case of *Hand v. Cook*, 92 Pac. Rep. 3, a majority of the Supreme Court of Nevada held that the statute in question did not apply to a Deputy Mineral Surveyor; but the reverse was held by the Supreme Court of Utah in the case of *Lavagnio v. Uhlig*, 71 Pac. Rep. 1046. It will not do for a court to take a strained and narrow view of the language employed by Congress in its enactments, but rather give such a construction as will carry into effect its obvious intent. We entertain no doubt that a Deputy Mineral Surveyor is an employee "in the General Land Office" within the meaning of the Statute. That is the office in which the land laws of the United States are administered and executed, by and through the  
130 thousand and one officers and employees in and out of the particular building or buildings in which that department of the Government is conducted. Nor do we see that there is any much

clearer way to prohibit an act than to say expressly that it is prohibited. That Congress did in the section in question.

In the case of *Prosser v. Finn*, 208 U. S. 67, the Supreme Court held that section 452 applied to a Special Agent of the Land Department who had made an entry under the Timber Culture Act. The Court said:

"The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk or employee in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the timber-culture statute, Secretary Smith well said: 'When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the act to prevent. It follows from what has herein been set out that the decision of this Department of date July 7, 1893, was in error, and the same is hereby set aside, and the decision of your office is affirmed.'

131 "It is not clear from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the Land Office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office and are under its supervision and control with respect to the administration of the public lands. *Wells v. Nickles*, 104 U. S., 444; S. C., 1 L. D. 608, 620, 696; *Instructions to Special Timber Agents*, 2 L. D. 814, 819, 820, 821, 822, 827, 828, 832; *Circular of Instructions*, 12 L. D. 499. They are in every substantial sense employees in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands or with the investigation of applications for patents or with hearings before registers and receivers. Being employees in the General Land Office, it is not for the Court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. The provision in question had its origin in the acts of April 25, 1812, c. 68, 2 Stat. 716, and of July 4, 1836, c. 352, 5 Stat. 107. The first of those acts established a General Land Office, while the last one reorganized that office. Each of those acts made provision for the appointment of certain officers, and each limited the prohibition against the purchasing or becoming interested in the purchasing of public lands to the officers or employees named in them, respectively. But the prohibition in the existing statute is not restricted to any particular officers or particular employees of the Land Office, but em-

braces 'employees in the General Land Office,' without excepting any of them.

"In the eye of the law this case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who stated, in a letter, that Sec. 452, Rev. Stat., did not apply to special agents. That view, so far from being approved, was reversed, upon formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the Commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employee in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employee in the Land Office, he could not acquire an interest in the lands that would prevent the Government, by its proper officer or department, from cancelling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be determined by the validity of the original entry at the time it was made."

133 The principle of this case is, in our opinion, applicable to the one now before us.

The judgment is affirmed.

[Endorsed:] No. 1609. United States Circuit Court of Appeals, for the Ninth Circuit. Opinion. Filed May 3, 1909. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,  
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in  
Error.

*Judgment U. S. Circuit Court of Appeals.*

In Error to the District Court of the United States for the District of  
Alaska, Second Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alaska, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this



134 cause be, and the same is hereby, affirmed, with costs to the defendants in error; and that the defendants in error Joseph Hammer, Otto Halla, and B. Schwarz, recover against the said plaintiffs in error Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie for their costs herein expended, and have execution therefor.

{Endorsed:} Judgment. Filed and Entered May 3, 1909. F. D. Monckton, Clerk.

At a Stated Term, To Wit, the October Term, A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Wednesday, the Twenty-sixth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Present:

The Honorable William B. Gilbert, Circuit Judge.  
Honorable Erskine M. Ross, Circuit Judge.  
Honorable William H. Hunt, District Judge.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,  
vs.  
JOSEPH HAMMER et al., Defendants in Error.

*Order Denying Petition for Rehearing.*

It is ordered that the petition for a rehearing, heretofore filed in the above-entitled cause be, and hereby is denied.

135 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,  
vs.  
JOSEPH HAMMER et al., Defendants in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighteen (18) pages, numbered from one (1) to eighteen (18), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed



Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of June, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[SEAL.]

F. D. MONCKTON, *Clerk*.

136 UNITED STATES OF AMERICA, 88:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie are plaintiffs in error, and Joseph Hammer, Otto Halla and B. Schwarz are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Alaska, Second Division, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into  
137 the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

138 [Endorsed:] File No. 21,745. Supreme Court of the United States. No. 519, October Term, 1909. Frank H. Waskey et al., vs. Joseph Hammer et al. Docketed. No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Dec. 28, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

139 In the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,  
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in  
Error.

*Stipulation (of Counsel Relative to Return to Writ of Certiorari).*

It is hereby stipulated by and between the counsel for the Plaintiffs in Error and the Defendants in Error in the above-entitled action, that the certified Transcript of the Record used on the application to the Supreme Court of the United States for a Writ of Certiorari and now on file in said Supreme Court, may be deemed the certified Transcript of Record on return to the Writ of Certiorari issued out of the said Supreme Court in the case; and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in making his return to the said Writ may attach thereto a certified copy of this stipulation in lieu of another certified Transcript of the Record.

Dated this 21st day of October, 1909.

IRA D. ORTON,  
O. D. COCHRAN,  
F. E. FULLER,  
CAMPBELL, METSON, DREW, OATMAN &  
MANKENZIE AND  
E. H. RYAN,

*Attorneys for Plaintiffs in Error.*

P. M. BRUNER,  
EDWARD LANDE,  
JOHN P. ALLEN,

*Attorneys for Defendants in Error.*

140 (Endorsed:) Stipulation of Counsel Relative to Return to Writ of Certiorari. Filed Dec. 28, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

141 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding two (2) pages, numbered from and including one (1) to and including two (2), to be a true and correct copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," filed in the above-entitled cause on the 23rd day of December, A. D. 1909, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*

142 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

*Return to Writ of Certiorari.*

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed Writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and,

pursuant thereto, do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit.*

[Endorsed:] 519/21,745.

143 [Endorsed:] File No. 21,745. Supreme Court U. S. October Term, 1909. Term No. 519. Frank H. Waskey et al., Petitioners, vs. Joseph Hammer et al. Writ of certiorari and return. Filed January 4, 1910.